

***United States Court of Appeals
for the Second Circuit***



APPENDIX

77-4213

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

Docket No. 77-4213

MAID OF THE MIST CORPORATION and
Affiliated Corporations,

Petitioner-Appellant,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent-Appellee.

Appeal From the United States Tax Court

JOINT APPENDIX

JOHN G. DOWD
Attorney for Appellant
Office & P.O. Address:
151 Buffalo Avenue
Niagara Falls, New York 14303
Telephone: 716-284-2311

M. CARR FERGUSON
Assistant Attorney General
Tax Division
Attorney for Appellee
U.S. Department of Justice
Washington, D.C. 20530
Telephone: 202-739-3009

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RELEVANT DOCKET ENTRIES IN PROCEEDING BELOW

Petition filed January 19, 1976.

Answer of Respondent filed February 25, 1976.

Trial at Buffalo, New York, before Judge Tannenwald,
November 8, 11, 1976.

Memorandum Findings of Fact and Opinion filed by
Judge Tannenwald, August 11, 1977.

Decision Entered, Judge Wiles, August 11, 1977.

UNITED STATES TAX COURT

WASHINGTON

MAID OF THE MIST CORPORATION and)
Affiliated Corporations,)

Petitioners,)

v.)

COMMISSIONER OF INTERNAL REVENUE,)

Respondent)

Docket No. 504-76

DECISION

Pursuant to the determination of the Court, as set forth in its Memorandum Findings of Fact and Opinion, filed August 11, 1977, it is

ORDERED and DECIDED: That there is a deficiency in income tax for the taxable year 1972 in the amount of \$11,831.61.

((signed) Darrell D. Wiles

Judge

Entered: AUG 11 1977

T. C. Memo. 1977-263

UNITED STATES TAX COURT

MAID OF THE MIST CORPORATION and Affiliated Corporations,
Petitioners v. COMMISSIONER OF INTERNAL REVENUE,
Respondent

Docket No. 504-76.

Filed August 11, 1977.

John G. Dowd, for the petitioners.

Louis J. Zeller, Jr., for the respondent.

MEMORANDUM FINDINGS OF FACT AND OPINION

TANNENWALD, Judge: Respondent determined a deficiency of \$11,881.61 in petitioners' 1972 income tax. The sole issue for decision is whether one of the petitioners ordered a steamship from a Canadian supplier while the investment tax credit on foreign-produced goods was suspended.

FINDINGS OF FACT

Some of the facts have been stipulated and are found accordingly. The stipulation of facts and exhibits attached thereto are incorporated herein by reference.

Petitioner Maid of the Mist Corporation is a New York corporation with its principal office located at Niagara Falls, New York, at the time of the filing of the petition herein. During 1972, Maid of the Mist Steamboat Co., Ltd. ("Ltd.") was a corporation existing under the laws of the Dominion of Canada with offices in Niagara Falls, Ontario, and was a wholly owned subsidiary of petitioner. For the taxable year 1972, petitioners elected to treat Ltd. as a domestic corporation. They filed a consolidated United States Corporation Income Tax Return with the

Internal Revenue Service Center, Andover, Massachusetts.

On December 16, 1971, James V. Glynn ("Glynn"), president and treasurer of petitioner Maid of the Mist Corporation and president of Ltd., met with representatives of Hike Metal Products, Ltd., of Wheatley, Ontario ("Hike"). At this meeting, which took place in Port Dover, Ontario, a contract between Ltd. and Hike concerning the construction and purchase of a steamship was signed.

The contract provided that \$3,000 of the purchase price was to be paid to Hike upon signing. Although Glynn had a check for that amount in his possession during the December 16 meeting, he did not deliver it to Hike. Instead, he delivered a letter, which read as follows:

We hand you herewith original and duplicate copy of contract for the construction of a vessel, duly executed by the Ship Owner.

This contract is conditionally delivered to you and such delivery shall become final when you are in receipt of the Ship Owner's check payable to your order in the sum of \$3,000.00.

As you are aware, this contract contemplates the building of a ship which Ship Owner will be able to place in the Niagara River beneath the Falls of Niagara

by the use of cranes. As of this date, the contract for such delivery has not been executed and it is anticipated that it will be executed within the next few days and, upon the acceptance of that contract, the undersigned will forward to you the above-mentioned check.

In the event that delivery of the contemplated vessel is not possible by crane, then it will be necessary for us to enter into a new contract, which will call for the building of the vessel and the delivery in parts to the Maid of the Mist Landing and its reassemblage at that point before launching. Therefore, the necessity of conditioning this delivery this date.

On December 18, 1971, a contract for the delivery of the vessel was signed and Glynn mailed a check for \$3,000 to Hike from an Ontario, Canada, post office box. Hike received this check on December 21, 1971.

The vessel was delivered to Ltd. in June, 1972.

OPINION

For the taxable year 1972, there was allowed a credit against tax equal to the "applicable percentage of the basis of each new section 38 property (as defined in section 48(b)) placed in service by the taxpayer during such taxable year." Sections 38(a), 46(c).¹

1

All section references are to the Internal Revenue Code of 1954 as amended and in effect during the taxable years in question.

Section 48(a)(7)² provides that foreign manufactured property acquired pursuant to an order placed between August 16, 1971, and the termination of Proclamation 4074, 85 Stat. 926 (1971), is not property eligible for the investment credit. By Proclamation 4098, 86 Stat. 1591 (1971), Proclamation 4074 was terminated as of December 20, 1971. The issue is whether the steamship in question was acquired pursuant to an order placed on or before December 20, 1971.

2

Section 48(a)(7) provides in relevant part:

SEC. 48(a)(7). Property completed abroad or predominantly of foreign origin.--

(A) In general.--Property * * * shall not be treated as section 38 property if--

(i) such property was completed outside the United States, or

(ii) less than 50 percent of the basis of such property is attributable to value added within the United States.

* * *

(B) Period of application of paragraph.-- Except as provided in subparagraph (D), subparagraph (A) shall apply only with respect to property described in section 50--

(i) the construction, reconstruction, or erection of which by the taxpayer is begun after August 15, 1971,

- continued -

Section 1.48-1(o)(2)(i), Income Tax Regs., provides, in relevant part, as follows:

An order is any directive, written or oral, to another person reasonably designed to effect the acquisition of property at a later date. An order need not be a binding contract.

We have no doubt that Ltd. placed an order prior to December 20, 1971, within the meaning of this regulation. Irrespective of whether the December 16 agreement constituted a legally binding contract prior to Hike's receipt of the check, the mailing of the check on December 18 at the very least made the previously signed agreement an unconditional offer to purchase the vessel and therefore an "order" by Ltd. as of that date. Moreover, we think that Ltd. and Hike agreed to be bound by the December 16 agreement, subject only to Ltd's obtaining a contract for the delivery of the vessel. This was accomplished on December 18, 1971, so that, from

Footnote 2--continued

and on or before the date of termination of Proclamation 4074, or

(ii) which is acquired pursuant to an order placed on or before the date of termination of Proclamation 4074, * * *.

that time onward, the parties were unconditionally bound. See McCool v. Grant & Dunn, 48 Ont. L.R. 630 (1921); Saskatchewan Co-op. Wheat Producers, Ltd. v. Zurowski, 3 D.L.R. 810 (1926, Sask. Ct. App.). See also 5 Williston on Contracts, sec. 663 (3d ed. 1961).

Decision will be entered
for the respondent.

UNITED STATES TAX COURT

MAID OF THE MIST CORPORATION	)	
and Affiliated Corporations,	)	
	)	
	)	
Petitioners,	)	
	)	
	)	
v.	)	
	)	
COMMISSIONER OF INTERNAL REVENUE,	)	
	)	
Respondent.	)	

Docket No. _____

PETITION

The petitioners hereby petition for a redetermination of the deficiency set forth by the Commissioner of Internal Revenue in his notice of deficiency (Ap:Buf:RJL:FES), dated the 28th day of October, 1975, and as the basis for their case allege as follows:

1. The petitioner, MAID OF THE MIST CORPORATION, is a corporation, duly organized and existing in accordance with the Laws of the State of New York, having its principal office

at No. 151 Buffalo Avenue, Niagara Falls, New York, 14303, and its affiliated corporations are MAID OF THE MIST ENTERPRISES, INC., a corporation, duly organized and existing in accordance with the Laws of the State of New York, having its principal office at No. 151 Buffalo Avenue, Niagara Falls, New York, 14303, and MAID OF THE MIST STEAMBOAT COMPANY, LIMITED, a corporation, duly organized and existing in accordance with the Laws of the Dominion of Canada, having its principal office at No. 5920 River Road, Niagara Falls, Ontario, Canada, L2E 6V6. The consolidated return for the period herein involved was filed with the Office of the Internal Revenue Service at Andover, Massachusetts.

2. The notice of deficiency, a copy of which, including so much of the statement and schedules accompanying the notice as is material, is attached and marked Exhibit A, was mailed to the petitioners on the 28th day of October, 1975, and was issued by the Office of the Internal Revenue Service at Buffalo, New York. Also attached hereto and marked Exhibit B is the examination report (I.R.S. Form L-191A(Rev. 4-74), dated March 25, 1975, and Page 7 of Form 886-A (rev. April 1968)).

3. The deficiency as determined by the Commissioner is in income tax for the calendar year 1972 in the amount of

\$11,881.61, of which \$9,081.61 is in dispute.

4. The determination of tax set forth in said notice of deficiency is based upon the following error:

(a) The holding that the vessel was acquired pursuant to an order placed on the 16th day of December, 1971, rendering it ineligible for investment credit pursuant to the provisions of Section 48(a)(7)B;(ii) of the Internal Revenue Code.

5. The facts upon which the petitioners rely, as the basis of their case, are as follows:

(a) That a contract for the construction of a vessel in the amount of \$129,737.32 was prepared for the petitioner, MAID OF THE MIST STEAMBOAT COMPANY, LIMITED, by Logan, Knight & McDermid, Barristers & Solicitors, of Niagara Falls, Ontario, Canada.

(b) That said contract as prepared by said attorneys was dated the 14th day of December, 1971.

(c) That said construction contract was executed by the parties thereto, to-wit: MAID OF THE MIST STEAMBOAT COMPANY, LIMITED (party of the first part) and HIKE METAL PRODUCTS, LIMITED (party of the second part) on the 16th day

of December, 1971, at Port Dover, Ontario.

(d) That after the execution of said construction contract, said document was personally and conditionally delivered to the then President of HIKE METAL PRODUCTS, LIMITED with a letter setting forth the conditions of said delivery wherein said construction contract was not to be effective until the party of the second part was in receipt of the party of the first part's check in the sum of \$3 000.00. The aforementioned letter of conditional delivery was dated December 16, 1971. One of the conditions of the above-mentioned delivery was the execution of a contract assuring the delivery of the vessel to the waters of the lower Niagara River by crane.

(e) That, thereafter and on or about the 18th day of December, 1971, the party of the first part entered into a contract with MODERN CRANE RENTALS, LIMITED, for the delivery of the vessel to be constructed from the waters of the upper Niagara River to the waters of the lower Niagara River beneath Niagara Falls.

(f) That Proclamation 4074 was terminated by the President of the United States on the 19th day of December, 1971.

(g) That on the 21st day of December, 1971, the \$3,000.00 payment provided for in the construction contract, dated the 14th day of December, 1971, and the letter of conditional delivery, dated December 16, 1971, was delivered to HIKE METAL PRODUCTS, LIMITED.

(h) That the construction contract conditionally delivered on the 16th day of December, 1971, was not an order within the meaning of Section 48(a)(7)B;(ii) of the Internal Revenue Code.

(i) That the construction contract was not effective as an order until the 21st day of December, 1971.

WHEREFORE, petitioners pray that the determination of the Commissioner in disallowing the investment credit arising from the construction of the vessel in the amount of \$9,081.61 be deemed in error and the Commissioner directed to recognize such corporate investment credit in the amount of \$9,081.61.

Dated: January 7, 1976.

(L.S.)

JOHN G. DOWD
Attorney for Petitioners
Office & Post Office Address:
151 Buffalo Avenue
Suite 201
Niagara Falls, New York 14303
Telephone: (716) 284-2311

UNITED STATES TAX COURT

MAID OF THE MIST CORPORATION and	FILED	)
AFFILIATED CORPORATIONS,	1976 FEB 25 PM	) 45
Petitioners,		)
v.	UNITED STATES	) Dkt. No. 504-76
	TAX COURT	)
COMMISSIONER OF INTERNAL REVENUE,		)
Respondent.		)

ANSWER

THE RESPONDENT, in answer to the petition filed in the above-entitled case, admits, denies and alleges as follows:

1. and 2. Admits the allegations of paragraphs 1 and 2 of the petition.

3. Denies the allegations of paragraph 3 of the petition. Alleges that the deficiency as determined by the respondent is for the taxable year 1972 in the amount of \$11,881.61, all of which is in dispute.

4. (a) Denies the allegations of error of paragraph 4(a) of the petition.

5. (a) and (b). Admits the allegations of paragraphs 5(a) and 5(b) of the petition.

(c). Admits that the contract described in paragraph 5(a) was executed by Maid of the Mist Steamboat Company, Limited and

SERVED FEB 26 1976

Hike Metal Products, Limited. Denies the remaining allegations of paragraph 5(c) of the petition.

(d) Admits that after the execution of the contract in question, it was personally delivered to the president of Hike Metal Products, Limited with a letter dated December 16, 1971. Admits that said letter stated that the contract was conditioned upon the receipt of a check in the amount of \$3,000.00 by Hike Metal Products and upon the execution of a contract assuring delivery of the vessel to the waters of the lower Niagara River by crane. Denies the remaining allegations of paragraph 5(d) of the petition.

(e) and (f). Admits the allegations of paragraphs 5(e) and (f) of the petition.

(g) through (i). Denies the allegations of paragraphs 5(g) through (i) of the petition.

6. Denies generally each and every allegation of the petition not hereinbefore admitted, qualified or denied.

WHEREFORE, it is prayed that the deficiency determined by the respondent be in all respects approved.

Date: FEB 19 1976

OF COUNSEL:

THEODORE E. DAVIS
Regional Counsel
LOUIS J. ZELLER, JR.
Attorney
304 U.S. Courthouse
Buffalo, N. Y. 14202
Tel. No. 716-842-6834

MEADE WHITAKER
Chief Counsel
Internal Revenue Service

By: (Sgd) Stephen M. Miller
STEPHEN M. MILLER
Assistant Regional Counsel

UNITED STATES TAX COURT

MAID OF THE MIST CORPORATION and)
 AFFILIATED CORPORATIONS,)

Petitioners,)

v.)

COMMISSIONER OF INTERNAL REVENUE,)

Respondent.)

Dkt. No. 504-76

STIPULATION OF FACTS

It is hereby stipulated and agreed by and between the parties hereto that, for purposes of this case, the following statements are accepted as facts, subject to the right of either party to object to the admission into evidence of such facts on the grounds of materiality and relevancy, and the exhibits referred to herein and attached hereto are incorporated in this stipulation and made a part hereof; provided, however, that either party may introduce other and further evidence consistent with the facts herein stipulated.

1. Maid of Mist Corporation [hereinafter referred to as petitioner] is a duly organized corporation existing in accordance with the laws of the State of New York. Its principal office at the time it filed the petition was located at 151 Buffalo Avenue, Niagara Falls, New York 14303. During

1972 Maid of the Mist Enterprises, Inc. was a duly organized corporation existing under the laws of the State of New York and was a wholly owned subsidiary of petitioner. During 1972 Maid of the Mist Steamboat Co., Ltd. was a corporation existing under the laws of the Dominion of Canada and was a wholly owned subsidiary of petitioner. The principal office of Maid of the Mist Steamboat Co., Ltd. was located at 5920 River Road, Niagara Falls, Ontario, Canada during 1972.

2. For the taxable year 1972 the petitioner elected to treat Maid of the Mist Steamboat Co., Ltd. as a domestic corporation and filed a consolidated income tax return with both of its subsidiary corporations. A copy of said return is attached hereto as Joint Exhibit 1-A.

3. On August 15, 1971 President Richard M. Nixon issued Presidential Proclamation 4074 entitled "Imposition of Supplemental Duty for Balance of Payments." A copy of said proclamation is attached hereto as Joint Exhibit 2-B.

4. On December 14, 1971 a representative of Logan, Knight and Mc Dermid, Barristers & Solicitors of Niagara Falls, Ontario, Canada, counsel for petitioners, drafted a proposed contract between Maid of the Mist Steamboat Co., Ltd. and Hike Metal Products, Ltd. for the construction and purchase of a steamship. A copy of said contract is attached hereto as Joint Exhibit 3-C.

5. On Thursday, December 16, 1971 James V. Glynn, who is president and treasurer of petitioner and general manager of Maid of the Mist Steamboat Co., Ltd., met with representatives of Hike Metal Products, Ltd. to discuss the proposed contract attached hereto as Joint Exhibit 3-C. Said proposed contract was signed by representatives of Maid of the Mist Steamboat Co., Ltd. and Hike Metal Products, Ltd. on December 16, 1971.

6. The contract attached hereto as Joint Exhibit 3-C was delivered to the representative of Hike Metal Products, Ltd. together with a letter during the December 16th meeting. A copy of said letter is attached hereto as Joint Exhibit 4-D.

7. James V. Glynn had in his possession during the December 16th meeting, a check in the amount of \$3,000.00. The payee of the check was Hike Metal Products, Ltd. A copy of said check is attached hereto as Joint Exhibit 5-E. The check was not delivered to Hike Metal Products, Ltd. during the meeting.

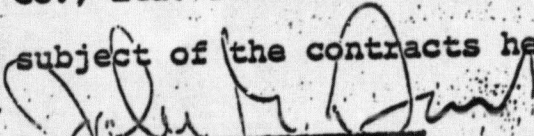
8. On Saturday, December 18, 1971 representatives of Modern Crane Rentals, Ltd. of Ontario, Canada and Maid of the Mist Steamboat Co., Ltd. signed a contract. A copy of said contract is attached hereto as Joint Exhibit 6-F.

9. On December 18, 1971 after signing the contract attached hereto as Joint Exhibit 6-F, James V. Glynn mailed the check attached hereto as Joint Exhibit 5-E to Hike Metal Products, Ltd. from an Ontario, Canada post office box.

10. On Monday, December 20, 1971 President Richard M. Nixon issued Presidential Proclamation 4098 entitled "Termination of Additional Duty for Balance of Payment Purposes." A copy of said proclamation is attached hereto Joint Exhibit 7-G.

11. On Tuesday, December 21, 1971 Hike Metal Products, Ltd. received the check attached hereto as Joint Exhibit 5-E as evidenced by the letter attached hereto as Joint Exhibit 8-H.

12. During June of 1972, Maid of the Mist Steamboat Co., Ltd. received delivery of the steamship that was the subject of the contracts herein.


JOHN G. DOWD
Counsel for Petitioners
151 Buffalo Avenue
Niagara Falls, N.Y. 14303
Tel. No. 716-284-2311

MEADE WHITAKER
Chief Counsel

By:

STEPHEN M. MILLER
Assistant Regional Counsel
304 U.S. Courthouse
Buffalo, N.Y. 14202
Tel. No. 716-842-6834

Date:

Title 3—The President

PROCLAMATION 4074

Imposition of Supplemental Duty
for Balance of Payments Purposes*By the President of the United States of America*

A Proclamation

WHEREAS, there has been a prolonged decline in the international monetary reserves of the United States, and our trade and international competitive position is seriously threatened and, as a result, our continued ability to assure our security could be impaired;

WHEREAS, the balance of payments position of the United States requires the imposition of a surcharge on dutiable imports;

WHEREAS, pursuant to the authority vested in him by the Constitution and the statutes, including, but not limited to, the Tariff Act of 1930, as amended (hereinafter referred to as "the Tariff Act"), and the Trade Expansion Act of 1962 (hereinafter referred to as "the TEA"), the President entered into, and proclaimed tariff rates under, trade agreements with foreign countries;

WHEREAS, under the Tariff Act, the TEA, and other provisions of law, the President may, at any time, modify or terminate, in whole or in part, any proclamation made under his authority;

NOW, THEREFORE, I, RICHARD NIXON, President of the United States of America, acting under the authority vested in me by the Constitution and the statutes, including, but not limited to, the Tariff Act, and the TEA, respectively, do proclaim as follows:

A. I hereby declare a national emergency during which I call upon the public and private sector to make the efforts necessary to strengthen the international economic position of the United States.

B. (1) I hereby terminate in part for such period as may be necessary and modify prior Presidential Proclamations which carry out trade agreements insofar as such proclamations are inconsistent with, or proclaim duties different from, those made effective pursuant to the terms of this Proclamation.

(2) Such proclamations are suspended only insofar as is required to assess a surcharge in the form of a supplemental duty amounting to 10 percent ad valorem. Such supplemental duty shall be imposed on all dutiable articles imported into the customs territory of the United States from outside thereof, which are entered, or withdrawn from warehouse, for consumption after 12:01 a.m., August 16, 1971, provided, however, that if the imposition of an additional duty of 10 percent ad valorem would cause the total duty or charge payable to exceed the total duty or

charge payable at the rate prescribed in column 2 of the Tariff Schedules of the United States, then the column 2 rate shall apply.

C. To implement section B of this Proclamation, the following new subpart shall be inserted after subpart B of part 2 of the Appendix to the Tariff Schedules of the United States:

SUBPART C—TEMPORARY MODIFICATIONS FOR BALANCE OF PAYMENTS PURPOSES

Subpart C headnotes:

1. This subpart contains modifications of the provisions of the tariff schedules proclaimed by the President in Proclamation 407.

2. *Additional duties imposed*—The duties provided for in this subpart are cumulative duties which apply in addition to the duties otherwise imposed on the articles involved. The provisions for these duties are effective with respect to articles entered on and after 12:01 a.m., August 16, 1971, and shall continue in effect until modified or terminated by the President or by the Secretary of the Treasury (hereinafter referred to as the Secretary) in accordance with headnote 4 of this subpart.

3. *Limitation on additional duties*—The additional 10 percent rate of duty specified in rate of duty column numbered 1 of item 948.00 shall in no event exceed that rate which, when added to the column numbered 1 rate imposed on the imported article under the appropriate item in schedules 1 through 7 of these schedules, would result in an aggregated rate in excess of the rate provided for such article in rate of duty column numbered 2.

4. For the purposes of this subpart—

(a) *Delegation of authority to Secretary*—The Secretary may from time to time take action to reduce, eliminate or reimpose the rate of additional duty herein or to establish exemption therefrom, either generally or with respect to an article which he may specify either generally or as the product of a particular country, if he determines that such action is consistent with safeguarding the balance of payments position of the United States.

(b) *Publication of Secretary's actions*—All actions taken by the Secretary hereunder shall be in the form of modifications of this subpart published in the FEDERAL REGISTER. Any action reimposing the additional duties on an article exempted therefrom by the Secretary shall be effective only with respect to articles entered on, and after the date of publication of the action in the FEDERAL REGISTER.

(c) *Authority to prescribe rules and regulations*—The Secretary is authorized to prescribe such rules and regulations as he determines to be necessary or appropriate to carry out the provisions of this subpart.

5. *Articles exempt from the additional duties*—In accordance with determinations made by the Secretary in accordance with headnote 4(a), the following described articles are exempt from the provisions of this subpart:

15726

THE PRESIDENT

Item	Article	Rates of duty	
		1	2
948.00	Articles, except as exempted under headnote 5 of this subpart, which are not free of duty under these schedules and which are the subject of tariff concessions granted by the United States in trade agreements.....	10% ad val.... (See headnote 3 of this subpart.)	No change.

D. This Proclamation shall be effective 12:01 a.m., August 16, 1971.

IN WITNESS WHEREOF, I have hereunto set my hand this fifteenth day of August in the year of our Lord nineteen hundred and seventy-one, and of the Independence of the United States of America the one hundred and ninety-sixth.

Richard Nixon

[FR Doc.71-12120 Filed 8-16-71;12:26 pm]

NOTE: For the text of the President's radio and television address in connection with Proclamation 4074, above, see Weekly Comp. of Pres. Docs., Vol. 7, No. 34, issue of Aug. 23, 1971.

DATE

Dec 14th

19 72

CONTRACT

LOGAN, KNIGHT & McDERMID
603 QUEEN STREET
NIAGARA FALLS, CANADA

DET NO. 504-76
J. EXH. 3-6

THIS AGREEMENT made the 14th day of December, A.D. 1971

BETWEEN:

MAID OF THE MOST STEAMBOAT COMPANY LIMITED, of the
City of Niagara Falls, Ontario, hereinafter called
the "SHIPOWNER"

OF THE FIRST PART

- and -

HIKE METAL PRODUCTS LIMITED, of the Village of
Wheatley, Ontario, hereinafter called the "SHIPBUILDER"

OF THE SECOND PART

1. PARTICULARS, PLANS AND SPECIFICATIONS

The Shipbuilder, in consideration of the purchase price hereinafter stipulated, shall supply all plans, labour, superintendence service, materials, supplies and equipment and shall build, launch, equip and complete ready for service within the terms of this contract and delivery at the Shipbuilder's works, Wheatley, Ontario, to the Shipowner or its representative, one twin screw diesel driven motor vessel.. The vessel shall be constructed in a sound and workmanlike manner in all respects and of new first grade materials and equipment in accordance with a general arrangement plan similar to that of the plans for the Maid of the Mist II, which have been provided to the ship builders, modified, however, to conform with the mid-section of drawing of John Maytham, a copy of which is attached hereto and marked Exhibit "A", and the Specifications which are attached hereto and marked Exhibit "B" and signed by the parties hereto, John Maytham, Port Dover, Ontario, shall hereafter prepare

LOGAN, KNIGHT & McDERMID

BARRISTERS & SOLICITORS
NIAGARA FALLS, CANADA

a similar arrangement plan, construction detail plan and lines plan for the construction of the vessel herein involved and, upon the completion of the same and acceptance by the shipowner, or his representative, shall become part of this contract document. The Shipbuilder shall not employ on the work any unfit person, or anyone not skilled in the work assigned to him.

The Shipbuilder shall be liable to replace at its own expense any defective or sub-grade materials used, or any work not completed in accordance with the terms of the contract notwithstanding that final payment may have been made or/and acceptance of delivery of the vessel has been taken by the Owner, notwithstanding the provisions of paragraph # 7 of this Agreement. (The plans and specifications are intended to explain each other and anything upon the plans and not stipulated in the specifications or stipulated in the specifications and not shown on the plans shall be deemed and considered as if included in both. Should there be any inconsistencies or contradictions between the plans and specifications the specifications shall govern subject always to the approval of the Shipowner. Should there be any inconsistencies or contradictions between this contract and the specifications the contract shall prevail and be adopted.)

2. CERTIFICATES

The Vessel with its equipment and propelling machinery shall be constructed to Class II Minor Waters Certificate, Dominion Department of Transport. It shall be the duty of the Shipbuilder to obtain and deliver to the Shipowner all necessary certificates to

LOGAN, KNIGHT & McDERMID

BARRISTERS & SOLICITORS
NIAGARA FALLS CANADA

pass the Dominion Department of Transport requirements, ready to carry 150 passengers for sight-seeing purposes. *Unless D.O.T. alters existing regulations which would require a lesser number*
3. PRICE *in passengers.*

The Shipowner agrees that in consideration of and subject to the performance and observance on the part of the Shipbuilder of its obligations under this contract, the Shipbuilder shall be paid at its offices at Wheatley, Ontario, Canada, the price and sum of ONE HUNDRED AND TWENTY-TWO THOUSAND, THREE HUNDRED (\$122,300.00) DOLLARS of lawful money of Canada (herein referred to as the "purchase price"). The said purchase price to be paid to the Shipbuilder as aforesaid respectively by the Shipowner and by way of instalments as follows, namely:

(1) Signing of Agreement	\$ 3,000.00
(2) Upon Commencement of Construction and proof of material and labour on site in the aggregate amount of \$15,000.00	15,000.00
(3) When framing 90% completed [and approval of construction plans are obtained]	22,840.00
(4) When shell and deck plating 90% completed	22,840.00
(5) When all machinery installed and 90% of superstructure and house is completed	30,680.00
(6) When launched, completed, ready for delivery and passed by the Department of Transport	27,940.00
	<u>\$122,300.00</u>

Witnessed by: PHILIP T. McDERMID 10/5/51

LOGAN, KNIGHT & McDERMID
BARRISTERS & SOLICITORS
NIAGARA FALLS CANADA

4. SHIPOWNER'S REPRESENTATIVE

Shipowner, may, by written notice to Shipbuilder, designate a person or person, for and on behalf of Shipowner, as Shipowner's representative prior to delivery of the Vessel to perform the following acts:

- (1) To inspect all material and workmanship, approve all work and material conforming to the requirements of this contract and reject all work and materials not conforming to the requirements of this contract.
- (2) To employ its staff in connection with the Shipbuilder's staff on trials for the purpose of testing the general performance of the Vessel, and
- (3) Take other action in accordance with this contract to the end that the Vessel shall be built strictly in accordance with this contract.

5. TRIALS

There are to be general acceptance trials prior to delivery including tests for durability, speed, manoeuvrability and other tests necessary to confirm construction of the Vessel in accordance with the plans, specifications and in order to meet the requirements of the Dominion Department of Transport.

6. DELIVERY

The Shipbuilder shall use all reasonable despatch to deliver the Vessel on or before May 31st, 1972. The Shipbuilder shall in no way be responsible for construction or delivery of the Vessel being delayed due to causes beyond the control of the

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Shipbuilder, caused by strikes, shortages caused by strikes, or acts of God. In the event of any delays for one or more of the reasons aforesaid, the Shipbuilder shall forthwith notify the Shipowner of same in writing, and shall be allowed a reasonable extension of the completion date commensurate with the cause of the delay.

7. WARRANTY

The Shipbuilder holds the Shipowner indemnified within the limits of this clause against all defects in or damage to the hull of the Vessel and/or its machinery and/or its equipment due to faulty materials or workmanship and the Shipbuilder at its plant at Wheatley, Ontario, all defective workmanship and materials and damage in the hull of the Vessel and/or equipment or shall pay the Shipowner a sum of money equivalent to the cost to the Shipowner of carrying out such repairs or replacements, (and subject always to the provisions of paragraph # 1 of this Agreement) provided the defects or damage are discovered within four (4) calendar months and are notified in writing to the Shipbuilder by the Shipowner within four (4) calendar months from the date of final acceptance of the vessel by the Shipowner and provided such defects or damage or their causes are proved to have existed at the time of such delivery and that they have not been caused by perils of the sea, rivers or navigation or by wear and tear, fire mismanagement or neglect and further provided such defects or damage are not caused by alteration or additions by the Shipowner and further provided that the

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Shipbuilder has the privilege of inspecting such defective workmanship and materials and damage before the repair or replacement is made. In the case of propelling machinery, auxiliaries or other machinery or materials or fittings supplied but not manufactured by Shipbuilder, the Shipowner will be entitled only to the full benefits and will be subject to all the limitations of the guarantees which are given by the makers thereof, the Shipbuilder undertaking to ensure, within the limits of its legal rights, that all provisions contained in such guarantee are fully lived up to, but granting no warranty of its own on the equipment aforementioned; and provided always that the Shipbuilder will:

- (a) Construct where reasonably practical with the Shipowner, with reference to warranties offered by different manufacturers of similar products, and
- (b) Obtain and deliver to the Shipowner, at the time of delivery of the Vessel, all of such warranties.

8. INSURANCE

- (a) Until delivered and accepted by the Shipowner, the Vessel, its propelling machinery and all materials from time to time intended for the Vessel and within the yard or works of the Shipbuilder or "at risk" prior thereto (whether or not before or after the laying of the keel), shall be kept insured for the full purchase price by the Shipbuilder at its expenses with underwriters approved by the Shipowner under Builder's Risk policies in accordance with "Institute Clauses for Builder's Risk" including Collision Clause

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and Protection and Indemnity Clauses, and also including insurance against loss or damage caused by strikers, locked out workmen, and/or persons taking part in labour disturbances and/or riot or civil commotions. The costs of war risks insurance if required by Shipowner, shall be paid by the Shipowner. All such insurance on the Vessel, its machinery, materials, equipment, appurtenances and outfit, whether afloat or ashore, shall be maintained in an amount at no time less than the contract price as set forth in Clause 3 herein.

(b) In the event of the said vessel and/or its machinery and equipment sustaining damage at any time before delivery and acceptance of the Vessel, the moneys received in respect of the insurance shall be applied by the Shipbuilder in repairing and making good the said damage with all due dispatch during ordinary working hours in a good and workmanlike manner acceptable to the Shipowner's representative and so as to secure or maintain the intended Classification, and Shipowner shall not on account of the said damage or repair be entitled to object to the said Vessel or to make any claims for alleged consequential loss or depreciation. On completion and delivery of the Vessel to, and its acceptance by the Shipowner, all liability of the Shipbuilder under this clause shall cease; provided always that the Vessel is in fact completed in accordance with this contract and the plans and specifications.

(c) If before delivery the Vessel should from any cause become a total loss or be deemed for the purpose of insurance to be

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constructive total loss the Shipowner shall have the option of
(a) rescinding the contract and receiving the proceeds of any
policy or policies of insurance for the loss sustained, or
(b) applying the funds under the written contract for the
construction of a new Vessel.

(d) All policies, cover notes, etc., shall be in Canadian
dollars and the terms and conditions of such policies, cover notes,
etc., shall be subject to approval by Shipowner. All policies of insu-
rance, cover notes, etc. shall be payable in Canadian dollar to
Shipbuilder and Shipowner as their respective interests may appear.
All policies, cover notes, etc. with all premiums or other charges
prepaid by the Shipbuilder shall be held by Shipbuilder. Shipbuilder
shall furnish Shipowner promptly with certified copies of said
policies and cover notes, etc.

(e) The Shipbuilder shall pay all assessments under the Ontario
Workmen's Compensation Act and shall indemnify and save harmless
Shipowner and Shipowner's representative and each of them and
any agency and instrumentality of either of them, and the Vessel,
and shall at its own expense fully protect the Vessel, the
Shipowner, the Shipowner's representative and itself by adequate
casualty or liability insurance and Workman's Compensation Insurance
in such amounts and with such insurance company or companies as
shall be satisfactory to the Shipowner, against all claims which may
arise from accidents or casualties or damage to any employee,
workmen, invitees, licensees, trespassers and all other personnel an

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or property, in, on or about the construction of the vessel. It is expressly understood that the workmen engaged upon the work on the Vessel to be constructed hereunder shall at all times be deemed to be employees of Shipbuilder or its sub-contractors and not of Shipowner or Shipowner's representative.

(f) Without limitation of liability of the Shipbuilder howsoever arising, the Shipbuilder shall, from the execution of this contract until delivery of the Vessel to the Shipowner, be responsible for and make good at the Shipbuilder's expense and to Shipowner's satisfaction any and all losses, accidents, injuries and/or damages of any nature to the Vessel and/or the materials, fittings, stores equipment or machinery thereof, occurring through any act or default or neglect of the Shipbuilder and/or any of its sub-contractors, its employees, agents, workmen.

9. TITLE-LIENS

Title to and property in the Vessel shall be vested in the Shipowner from the signing of this contract. The vessel in all stages of construction, all equipment, machinery, materials and other articles and things attached to or placed on the Vessel and all equipment, materials and other articles and things bought or ordered for the Vessel shall be free from all liens, charges, encumbrances of any nature whatsoever, except only the Shipbuilder's liens (common law and statutory) for any unpaid portion of the purchase price applicable to the actual progress. Same shall, however, be deemed to be within the possession, order or disposal of the Shipbuilder for

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the sole purpose of the completion and due performance of this Contract and during such possession, order or disposal and until delivery to the Shipowner and acceptance by the Shipowner, the Shipbuilder shall bear and be subject to all the risks of loss or of damage of any nature whatsoever of or to the Vessel and all equipment, machinery, materials and other articles and things attached to or placed on or bought or ordered for the Vessel. If at any time any lien, charge or other encumbrance attached to the vessel or any equipment, machinery, materials or other articles or things attached to, placed on or bought or ordered therefore, the Shipowner may pay and discharge such liens, charges, or other encumbrances at the expense of the Shipbuilder including all legal fees and other expenses in connection therewith and the cost of removing said liens, charges or other encumbrances shall be borne by the Shipbuilder and may be deducted by the Shipowner from subsequent payments.

10. DEFAULT BY SHIPBUILDER

In the event of the Shipbuilder becoming insolvent or being declared bankrupt or going into liquidation (except for the purpose of reorganization or amalgamation) or due to any other default or neglect of the Shipbuilder, or failing because of financial difficulties for a period of sixty (60) days to continue the building of the Vessel in a regular and businesslike manner, (except due to Shipowner's default), the Shipowner may terminate this contract and may enter the Shipbuilder's shipyard and take

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possession of all such materials and things as are intended or proposed to be used in the construction of the Vessel and to make use of the machinery and equipment on Shipbuilder's premises necessary for the carrying out of the construction of the Vessel and to cause the construction of the Vessel to be completed by any person, firm or corporation whom the Shipowner may choose to employ for that purpose to use and employ all materials in the Shipbuilder's shipyard or elsewhere intended for the said Vessel and to purchase and provide any other materials properly to be employed therein and to pay for such materials and the wages of the workmen and expenses properly incurred in carrying out the work. 1 to deduct the amount thereof from the portion of the purchase price then unpaid if sufficient therefore and if not so sufficient to charge the Shipbuilder with any loss which the Shipowner may thus sustain, all without prejudice to all other rights the Shipowner may have against the Shipbuilder arising out of this contract.

11. DEFAULT BY SHIPOWNER

In the event that the Shipowner fails to pay to the Shipbuilder any amount due by it to the latter in accordance with the provisions of this contract, whether on account of the purchase price or otherwise, and such failure continues for a period of thirty (30) days from the date of invoice thereof, the Shipowner shall thereupon be deemed to be in default and shall be liable to pay the Shipbuilder interest on any such unpaid amount at the rate of nine

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per cent (9%) per annum until the same is paid in full. If any such default continues for a period of thirty (30) days after written notice of default has been given by registered mail by the Shipbuilder to the Shipowner or shall become bankrupt or insolvent or make any assignment for the benefit of its creditor, or shall have a receiving order made against it, or if an order shall be made or a resolution passed for the winding-up of the Shipowner (except for the purpose of reorganization or amalgamation) or if the Shipowner shall take the benefit of any statute for the time being in force relating to bankrupt or insolvent debtor, then upon the happening of any such event, the Shipbuilder may,

(a) By notice in writing and without other formality, terminate the contract and pursue such remedies as he is entitled to at law but without reimbursement of any payments previously received from the Shipowner and/or

(b) Sell the Vessel, machinery and equipment and all materials and things intended for the construction of the Vessel either by public auction (in which case it shall be lawful for the Shipbuilder or its agents to bid at such sale) or by private contract, on such terms and conditions, and either for cash or on credit, as the Shipbuilder may consider proper, and the Shipbuilder shall not be responsible for any loss incurred on any such sale whether by public auction or private contract, and/or,

(c) The Shipbuilder may complete the Vessel and sell the same as

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provided in sub-clause (b) hereof.

(d) The proceeds of any such sale under sub-clauses (b) or (c) hereof after deducting legal and other expenses in connection therewith shall be applied by the Shipbuilder as follows:

FIRST - In payment pro tanto TO THE Shipbuilder of any balances due it by the Shipowner under the provisions hereof as well as of all expenditures made by the Shipbuilder in respect of the custody or completion of the said vessel and of all loss (including loss of profit), costs, damages and expense otherwise incurred by the Shipbuilder as a result of the default, any deficiency to be recoverable by the Shipbuilder from the Shipowner.

SECOND - The balance, if any, shall belong to the Shipbuilder absolutely.

12. BUILDER'S CERTIFICATE

Delivery of a Builder's certificate for the Vessel shall be made to Shipowner by Shipbuilder upon completion of all trials and acceptance of the Vessel, and the Shipbuilder shall render all assistance necessary to enable the Shipowner to register the Vessel.

13. PATENT PROTECTION

The consideration under this contract shall include the use at all time of all inventions, patent rights, designs, copyright, licenses or trademarks pertaining to the Vessel, equipment, rigging

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devices, parts, appurtenances or accessories which are or are to be the property of Shipowner and the payment of all license fees and royalties in connection therewith. Shipbuilder also shall indemnify and save harmless Shipowner from and against all claims, actions, proceedings, damages, costs and liability arising from the foregoing or connected therewith. Shipowner shall give to Shipbuilder reasonable notice of any such claim, demand, action or proceeding arising from this Clause.

14. TAXES AND DUTIES

All applicable sales taxes and excise taxes and whether Federal, Provincial, Municipal or otherwise, shall be payable by the Owner in addition to the Purchase Price. The Shipbuilder shall assist the Owner to such extent as may be reasonably necessary in any application for exemption from such taxes.

15. VARIATIONS

The Shipowner, without invalidating the Contract, may make changes by altering, adding to or deducting from the work, the contract price to be adjusted accordingly. All such work shall be executed under the conditions of the original Contract, with a reasonable extension or reduction of time to be mutually agreed upon at the time of ordering such change.

No changes in the Agreement, plans or/and specifications shall be valid or binding unless made in writing and signed by the Shipowner and the Shipbuilder.

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16. DISPUTES AND ARBITRATION

If, during the building of the Vessel, a dispute arises between the parties hereto in regard to the construction of the vessel machinery and equipment or in respect of the materials or workmanship thereof or thereon or in respect of interpretation of specifications or plans, or any other dispute or difference between the parties with respect to anything arising out of the contract, the matter in dispute shall be referred to for decision to arbitrators, one to be selected by the Shipowner and the other by the Shipbuilder. In case the two arbitrators so selected cannot agree, they shall select a third and the decision of any two of the three shall be binding upon the parties hereto. In case the two arbitrators so selected cannot agree upon the selection of the third arbitrator, such third arbitrator shall be appointed by a Judge of the Supreme Court of Ontario, Canada, upon a reference being made to such Judge. A party who has not appointed an arbitrator after the other party has appointed one, shall do so within twenty-one (21) days after being notified in writing by registered mail by such other party to do so, and in default of appointment such other party's arbitrator may act as sole arbitrator and his decision shall be binding. If the arbitrator of either party shall fail to proceed with the consideration of the matters in dispute within twenty-one (21) days after being required to do so in writing by the other party's arbitrator, such other party's arbitrator, if a third man has not been appointed, shall be at liberty to act as sole arbitrator and

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his decision shall be binding on the other two arbitrators, if a third man has been appointed, may forthwith appoint an arbitrator in lieu of the one who has failed to proceed and the decision of two of such three arbitrators shall be binding. The costs of the arbitration shall be in the direction of the arbitrators provided, however, that no party shall be obliged to pay more than its own costs and the cost of the third arbitrator.

17. SUCCESSORS AND ASSIGNS

The contract shall, ensure to the benefit of and shall be binding upon the parties hereto, their successors and assigns, it being understood, however, that neither party to the contract shall assign this contract without written agreement of the other party.

18. NOTICES

Any notice or request given under this contract shall be deemed to have been sufficiently given, when if given to Shipbuilder, it shall be addressed to Shipbuilder at its Head Office, Post Office Box 144, Wheatley, Ontario and when if given to Shipowner, it shall be addressed to Shipowner at its Head Office 1920 River Road, Niagara Falls, Ontario, and in either case sent by registered mail, postage prepaid. Either party may give written notice of a change of address, in which event any such notice or request shall thereafter be given to it as provided at such changed address. The date of mailing shall be deemed to be the date on

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which such notice or request has been given provided the same shall thereafter be received in due course by the party to which same is mailed.

19. TOTAL AGREEMENT

This Agreement supersedes all previous communications and negotiations either verbal or written between the parties hereto with reference to the subject matter hereof and constitutes the whole Agreement between them.

IN WITNESS WHEREOF the corporate seal of the parties hereto attached to by the hands of their proper officers duly authorized for the purposes hereof.

MAID OF THE MIST STEAMBOAT COMPANY LIMITED

WITNESS:

HIKE METAL PRODUCTS LIMITED

WITNESS:

LOGAN, KNIGHT & McDERMID

BARRISTERS & SOLICITORS
NIAGARA FALLS, CANADA

SPECIFICATIONS

FOR

150 PASSENGER 65' TWIN SCREW BOAT

MAID OF THE MIST

PRINCIPAL DIMENSIONS

LENGTH OVERALL	64' 11"
LENGTH B.P.	
BEAM MOULDED	19' 0"
DEPTH MOULDED	7' 0"
DRAFT DESIGNED	5' 0"

DRAWINGS: Owner and principals to check main drawings before they are submitted to the Department for approval, to discuss construction.

DESIGNER: On the completion of the boat, the owner is to be supplied with one set of drawings. Lines plan, framing, etc. Designer to furnish owner with one hydrastatic curve showing - draft, displacement, V.C.B. KB-KM and GM at degrees of incline. Designer to supply owner with table of offsets.

INCLINE TEST: to be conducted at builders site. Owner to be notified when test to be done and owner supplied with complete figures on incline test. Incline to be acceptable to owner and Steamship Inspection.

BUILDER: to supply owner with specification sheets of all machinery and equipment with Model and Serial Numbers listed.

TRIAL RUNS: to be conducted at ~~builders site~~ shipbuilder's yard and at owner's site Performance of ship, engines and gears, steering, (hand hydraulic and standby) and all other equipment to be acceptable to owner and principals of Company. All warranties on engines and equipment to be registered and supplied to owner.

ACCEPTANCE: will be made ~~after~~ after ~~trial runs~~ and owner and builder agree that no ~~damage~~ damage to hull or machinery during trial runs are successful.

f.d.g.
S

December 16, 1971

NIKE METAL PRODUCTS LIMITED
Village of Wheatley, Ontario

Re: Ship Building Contract, dated 14th day of December, 1971
MAID OF THE MIST STEAMBOAT COMPANY LIMITED, Ship Owner
NIKE METAL PRODUCTS LIMITED, Ship Builder

Gentlemen:

We hand you herewith original and duplicate copy of contract for the construction of a vessel, duly executed by the Ship Owner.

This contract is conditionally delivered to you and such delivery shall become final when you are in receipt of the Ship Owner's check payable to your order in the sum of \$3,000.00.

As you are aware, this contract contemplates the building of a ship which Ship Owner will be able to place in the Niagara River beneath the Falls of Niagara by the use of cranes. As of this date, the contract for such delivery has not been executed and it is anticipated that it will be executed within the next few days and, upon the acceptance of that contract, the undersigned will forward to you the above-mentioned check.

In the event that delivery of the contemplated vessel is not possible by crane, then it will be necessary for us to enter into a new contract, which will call for the building of the vessel and its delivery in parts to the Maid of the Mist landing and its re-assembly at that point before launching. Therefore, the necessity of conditioning this delivery this date.

Per Order

Very truly yours,

MAID OF THE MIST STEAMBOAT COMPANY
LIMITED

By: _____

DKT NO. 504-76
J EXH 4-D

MAID of the MIST STEAMBOAT COMPANY
LIMITED

NIAGARA FALLS, ONT.

No 6364

December 16 19 71

PAY TO THE
ORDER OF

Hike Metal Products Limited

\$ 3000.00

MAID OF
THE MIST \$3000 AND 00 CTS

100 DOLLARS

IN SETTLEMENT OF "Signing of Agreement"

MAID OF THE MIST STEAMBOAT COMPANY LIMITED

CANADIAN IMPERIAL BANK OF COMMERCE

GENERAL MANAGER

VICTORIA & CENTRE
NIAGARA FALLS, ONT.

TREASURER

10857200101

0000300000

DIT NO. 50.4-71
J EXH. S-E

MADE December 12th, A.D. 1971.

AGREEMENT

MATTHEWS & MATTHEWS
Solicitors,
Niagara Falls, Ontario.

LOOM, ELLIOT & McDERMID
Solicitors,
Niagara Falls, Ontario.

THIS AGREEMENT made this 10th day of December, A.D. 1971.

BETWEEN:

PAID OF THE FINEST STEEL COMPANY
INC., incorporated under the laws of
 the Province of Ontario,
 hereinafter called "Owner"

- and -

PAID OF THE FINEST STEEL COMPANY
 incorporated under the laws of the
 Province of Ontario,
 hereinafter called "Contractor"

WHEREAS the Owner has presently contracted for the construction of a vessel, similar to the existing hull of the ship (hereinafter referred to as "the vessel") for the approximate sum of \$130,000.00 to be constructed at Wheatley, Ontario, by the Metal Products, said vessel to be completed and launched on or about the 1st day of June, 1972.

AND WHEREAS the Contractor has agreed to transport said vessel for the Owner from the "point of acceptance" (being, for the purposes of this contract the dry dock at Chippewa, Ontario) to the "point of delivery" (being, for the purposes of this contract in the waters of the Niagara River at the base of the launching ramp hereinafter referred to), on the terms and conditions hereinafter set forth:

NOW THIS AGREEMENT WITNESSETH that the parties hereto covenant and agree as follows:

1. CONTRACT PRICE

The Owner agrees to pay to the Contractor, subject to completion by the Contractor of all of its covenants, work, and obligations under the within contract (as hereinafter more specifically set forth) the price or sum of ^{56,000.00} \$60,000.00 in lawful money of Canada (herein referred to as "the contract price" payable as follows:-

2. ²⁹ - ⁴⁵
 (a) the sum of \$20,000.00, 30 days after delivery of the vessel to the owner at the point of delivery, and

(b) the balance in the amount of \$20,000.00, ²⁹ 60 days after the delivery as aforesaid.

(c) the within contract price shall be deemed to include all of the work and obligations to be performed and assumed by the contractor.

2. CONTRACTOR'S OBLIGATION

It shall be the obligation of the Contractor to remove the vessel from the River at the point of acceptance and transport and move said vessel to the point of delivery, in a good, efficient and proper manner, and without restricting the generality of the foregoing, the Contractor shall

(a) obtain, provide and use any and all necessary equipment, machinery, trucks, vehicles, cranes (including operators of same) and all necessary skilled workmen to properly and efficiently transport the vessel as aforesaid, and

(b) to transport the vessel along the presently agreed route viz. from the Hydro dock (being "the point of acceptance herein") along the Hydro service road, past the main water intake, along the River Road to Dufferin Islands, through Dufferin Islands returning to the River Road and proceeding to a point adjacent to the sight-seeing building at the top of the escarpment (opposite the Administration Building) at which point the Contractor shall lower the vessel to the Hydro road and transport same to a point thence near the Power House, from which point the Contractor shall slide the vessel down a ramp to be constructed adjacent to the said Power House into the water; said ramp to be constructed by the Contractor in a good and workmanlike manner of sufficient quality and strength, and proper design so as to permit the launching of the vessel without damage thereto.

3.

(c) unless otherwise specifically excluded by this contract, the Contractor shall be responsible for

(i) any and all damage caused to the vessel during the transportation thereof from the point of acceptance to the point of delivery, and

(ii) any damage to property or injury to persons caused by the transportation of the vessel as aforesaid, or as a result of any act or omissions for whatever reason, arising therefrom, and the contractor hereby agrees to indemnify and save harmless the Owner from and against any and all liability directly or indirectly arising pursuant to the provisions of sub paragraph (i) and (ii) immediately preceding; PROVIDED ALWAYS, that it shall be the responsibility of the Owner to make good any damage caused to the lawns and gardens of the Parks Commission from that point on the Parks Road crossing the lawn to the top of the escarpment (as above referred to) being the agreed point at which the vessel is to be lowered to the Hydro road.

(d) provide and make ready all such equipment and labour as is necessary to effect the transportation of the vehicle as soon as the vessel is docked at the point of acceptance, subject to and conditional upon, the Owner

(i) advising the contractor from time to time as to the progress in the construction of the vessel and as nearly as possible, the date of completion of construction thereof, and

(ii) providing the contractor with at least one week's notice of the date of launching of same at Wheatley, Ontario, it being stipulated by the Owner that moving the vessel from Wheatley to the 'point of acceptance' will require approximately four days from the date of departure.

(e) except as hereinafter specifically excepted, obtain all necessary permits from all such Agencies as may be required to transport the vessel (including the construction of the launching ramp) as aforesaid, SAVE AND EXCEPT the following permits and consents which shall be obtained by the Owner

(i) consent from Ontario Hydro, and

(ii) consent from the Niagara Parks Commission relating to that portion of the transportation route owned or/and controlled by said Commission; provided always that the Contractor agrees to be bound by and abide by the terms of the above-mentioned consents and all permits issued thereunder.

(f) to complete the transportation of the vessel from the point of delivery to the point of acceptance, so far as is reasonably possible, using all necessary equipment, labour and materials, within ten days of docking of the vessel at the point of acceptance, taking into consideration all acts or/and things for which the Contractor cannot reasonably be held responsible.

(g) The Contractor agrees to provide to the Owner proof of payment of all Workmen's Compensation levies for its employees as provided for in the Workmen's Compensation Act and further agrees to indemnify and save harmless the Owner from and against any and all liability for injuries sustained by any of its employees performing the work under this contract.

3. STIPULATIONS OF VESSEL

The Owner stipulates that the vessel

(a) shall not exceed 65 tons (130,000 lbs.) in total weight, and

(b) shall not exceed ^{72' 0"}~~65' 0"~~ in length, and

5. 24'0"

beed 20' 0" in width, and

beed 14' 0" in total height;

provided a. its own expense shall remove the canopy of . . . point of acceptance to reduce the height of the vessel . . . opinion of the contractor, same is necessary to ensure . . . transportation of the vessel as aforesaid; in which . . . Contractor shall transport the hull and canopy of . . . vessel separately but at the same contract price as heretofore stipulated.

(c) will contain eight lifting lugs affixed thereto of sufficient design and strength and so located as to permit level balance and suspension of the vessel and to permit attachment to same by crane hooks for the purpose of permitting the contractor to safely and properly transport the vessel and without limiting the generality of the foregoing to enable the contractor to safely lift the vessel from the water and load same at the point of acceptance and to subsequently lower same from the encasement to the Hydro road and lower same down launching ramp into the water.

4. INSURANCE

(a) The Contractor and Owner agree to jointly obtain and maintain during the term of the transportation of the vessel sufficient comprehensive insurance coverage on the vessel and against any and all liability arising out of the contract and the work to be performed pursuant thereto, as follows:-

(i) said insurance coverage to insure the respective interests of the parties hereto, Niagara Parks Commission and Ontario Hydro as their respective interests and liabilities may appear, and

(ii) the premium payable for said insurance coverage shall be apportioned between the Owner and Contractor

6.

in a fair and equitable ratio bearing in mind the respective duties and responsibilities of the said parties under the within contract.

(b) for the purpose of this paragraph the term "sufficient comprehensive insurance coverage" shall mean

3,30,000
(A) not less than \$170,000.00 coverage on the vessel, and

(B) liability coverage as may be agreed upon between the parties hereto but in any event not less than those limits required by Niagara Parks Commission on/and Ontario Hydro, and

(c) such further and other coverage as the parties hereto may agree upon.

5. POWER OF TRANSPORTATION

The Contractor acknowledges having travelled the route of transportation as set forth in paragraph 2 (b) hereof and agrees that it will not vary from same without the consent in writing, first obtained, from the Owner.

6. REMOVAL OF RAMP

The Contractor agrees to remove the launching ramp heretofore referred to after its function has been completed, conditional upon receiving consent to do so from Ontario Hydro.

7. ASSIGNMENT

The contract shall not be assignable by the Contractor without the Owner's written consent.

IN WITNESS WHEREOF the Parties hereto have hereto affixed their respective corporate seals duly attested by the hands of their

proper officers in that behalf.

MAID OF THE MIST STEAMSHIP COMPANY LTD.

Per:

James C. Higgins
President.

MAID OF THE MIST STEAMSHIP COMPANY LTD.

Per:

W. H. L. O.
President.

Presidential Documents

Title 3—The President

PROCLAMATION 4098

Termination of Additional Duty for Balance of Payments Purposes

By the President of the United States of America

A Proclamation

WHEREAS, in order to impose a surcharge required by the balance of payments position of the United States, Proclamation 4074, dated August 15, 1971, terminated in part for such period as necessary prior Presidential Proclamations insofar as such proclamations were inconsistent with, or proclaimed duties different from, those made effective pursuant to the terms of Proclamation 4074;

WHEREAS, a multilateral agreement has been reached among the Group of Ten major industrial nations which permits removal of the surcharge;

WHEREAS, under section 350(a)(6) of the Tariff Act of 1930, as amended (hereinafter referred to as "the Tariff Act"), and section 255(b) of the Trade Expansion Act of 1962 (hereinafter referred to as "the TEA"), and other authority, the President may, at any time, terminate, in whole or in part, for such period as may be necessary, any proclamation, issued pursuant to section 350 of the Tariff Act or Title II of the TEA;

WHEREAS, under section 350(a)(1)(B) of the Tariff Act and section 201(a)(2) of the TEA, the President may proclaim modifications of any existing duty as he determines to be required or appropriate to carry out trade agreements entered into under the authority of those Acts; and

WHEREAS, I hereby determine that modification of existing duties to restore the rates of duty applicable on August 15, 1971, terminated in part for such period as necessary by Proclamation 4074, is required or appropriate to carry out such trade agreements;

NOW, THEREFORE, I, RICHARD NIXON, President of the United States of America, acting under the authority vested in me by

FEDERAL REGISTER, VOL. 36, NO. 246—WEDNESDAY, DECEMBER 22, 1971

DKT NO. 504-76
J. EXH. 7-G

24202

THE PRESIDENT

the Constitution and the statutes, including, but not limited to, the Tariff Act, and the TEA, respectively, do proclaim as follows:

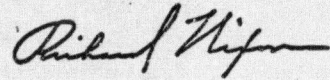
A. I hereby terminate paragraphs B and C of Proclamation 4074.

B. I hereby proclaim such modification of duties as is necessary to restore the rates of duty in effect on August 13, 1971.

C. To implement this Proclamation, the subpart inserted after subpart B of part 2 of the Appendix to the Tariff Schedules of the United States, entitled "SUBPART C—TEMPORARY MODIFICATIONS FOR BALANCE OF PAYMENTS PURPOSES" is deleted therefrom.

D. This Proclamation shall be effective with respect to merchandise entered, or withdrawn from warehouse, for consumption on or after December 20, 1971.

IN WITNESS WHEREOF, I have hereunto set my hand this twentieth day of December in the year of our Lord nineteen hundred and seventy-one, and of the Independence of the United States of America the one hundred and ninety-sixth.



[FR Doc. 71-18820 Filed 12-21-71; 9:59 am]

Hike Metal Products Ltd.

BOX 144

Wheatley - Ontario

Ship Building

Pleasure Boats

January 23, 1974

Maid of the Mist Steamboat Co. Ltd.
1920 River Road
Niagara Falls, Ontario

Attention: Mr. Dowd

Dear Sir:

Re: "Maid of the Mist III"

This is to advise that the cheque for the first payment in the amount of \$3000.00 was received December 21st. 1971.

Yours very truly,

HIKE METAL PRODUCTS LIMITED

W. Stevens

W. Stevens (Mrs.)
Bookkeeper

1/23/74

UNITED STATES TAX COURT

MAID OF THE MIST CORPORATION AND
AFFILIATED CORPORATIONS,

Petitioners,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

)
)
)
)
) Dkt. No. 504-76
)
)
)

SUPPLEMENTAL STIPULATION
OF FACTS

13. Attached hereto as Respondent's Exhibit I is a copy of "The Sale of Goods Act", Revised Statutes of Ontario 1970, Chapter 421. Said statute was in effect during 1971.

14. Attached hereto as Respondent's Exhibit J is a copy of Saskatchewan Co-op. Wheat Producers, Ltd. v. Zurkowski, 1926 D.L.R. Vol. 3, 810 (Sas. C.A. 1926).

15. Attached hereto as Respondent's Exhibit K is a copy of Mc Cool v. Grant and Dunn, 48 O.L.R. 630 (Ont. C.A. 1921).

16. Attached hereto as Respondent's Exhibit L is a copy of Harkness v. Pleasance, 12 D.L.R. 842 (B.C. S.C. 1913).

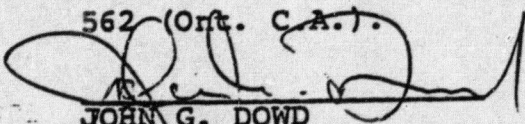
17. Attached hereto as Respondent's Exhibit M is a copy of Nichol v. Dixon, 1937 O.W.N. 677 (Ont. C.A.).

18. Attached hereto as Respondent's Exhibit N is a copy of

-2-

Aldercrest Developments, Ltd. v. Hunter, 1970 O.R. Vol. 2,

562 (Ont. C.A.).


JOHN G. DOWD
Counsel for Petitioners
151 Buffalo Ave.

Niagara Falls, N.Y. 14303 By:
Tel. No. 716-284-2311

MEADE WHITAKER
Chief Counsel
Internal Revenue Service

(Sgd) Stephen M. Miller

STEPHEN M. MILLER
Assistant Regional Counsel
304 U.S. Courthouse
Buffalo, N. Y. 14202
Tel. No. 716-842-6834

Date: NOV 2 1976

CHAPTER 421

The Sale of Goods Act

1.—(1) In this Act,

Interpre-
tation

- (a) "action" includes a counterclaim and a set off;
- (b) "buyer" means the person who buys or agrees to buy goods;
- (c) "contract of sale" includes an agreement to sell as well as a sale;
- (d) "delivery" means the voluntary transfer of possession from one person to another;
- (e) "document of title" includes a bill of lading and warehouse receipt as defined by *The Mercantile Law Amendment Act*, any warrant or order for the delivery of goods and any other document used in the ordinary course of business as proof of the possession or control of goods or authorizing or purporting to authorize, either by endorsement or delivery, the possessor of the document to transfer or receive goods thereby represented; R.S.O. 1970,
c. 272
- (f) "fault" means a wrongful act or default;
- (g) "goods" means all chattels personal, other than things in action and money, and includes emblements, industrial growing crops, and things attached to or forming part of the land that are agreed to be severed before sale or under the contract of sale;
- (h) "plaintiff" includes a defendant counterclaiming;
- (i) "property" means the general property in goods and not merely a special property;
- (j) "quality of goods" includes their state or condition;
- (k) "sale" includes a bargain and sale as well as a sale and delivery;
- (l) "seller" means a person who sells or agrees to sell goods;
- (m) "specific goods" means the goods identified and agreed upon at the time the contract of sale is made;
- (n) "warranty" means an agreement with reference to goods that are the subject of a contract of sale but collateral to the main purpose of the contract, the breach of which gives rise to a claim for damages but not to a right to reject the goods and treat the contract as repudiated.

DKT NO. 5704-76

R. EXH. I

9-1

Chap. 421

SALE OF GOODS

Sec. 1 (2)

Things done
in good
faith

(2) A thing shall be deemed to be done in good faith within the meaning of this Act when it is in fact done honestly whether it is done negligently or not.

What
deemed
insolvency

(3) A person shall be deemed to be insolvent within the meaning of this Act who either has ceased to pay his debts in the ordinary course of business or cannot pay his debts as they become due.

Deliverable
state

(4) Goods shall be deemed to be in a "deliverable state" within the meaning of this Act when they are in such a state that the buyer would under the contract be bound to take delivery of them. R.S.O. 1960, c. 358, s. 1.

PART I

FORMATION OF THE CONTRACT

Sale and
agreement
to sell

2.—(1) A contract of sale of goods is a contract whereby the seller transfers or agrees to transfer the property in the goods to the buyer for a money consideration, called the price, and there may be a contract of sale between one part owner and another.

Absolute or
conditional
What
constitutes
a sale or
agreement
to sell

(2) A contract of sale may be absolute or conditional.

(3) Where under a contract of sale the property in goods is transferred from the seller to the buyer, the contract is called a sale, but, where the transfer of the property in the goods is to take place at a future time or subject to some condition thereafter to be fulfilled, the contract is called an agreement to sell.

When
agreement
becomes
sale

(4) An agreement to sell becomes a sale when the time elapses or the conditions are fulfilled subject to which the property in the goods is to be transferred. R.S.O. 1960, c. 358, s. 2.

Capacity

3.—(1) Capacity to buy and sell is regulated by the general law concerning capacity to contract and to transfer and acquire property, but where necessaries are sold and delivered to a minor or to a person who by reason of mental incapacity or drunkenness is incompetent to contract, he shall pay a reasonable price therefor.

What
deemed
necessaries

(2) Necessaries in this section mean goods suitable to the conditions in life of the minor or other person and to his actual requirements at the time of the sale and delivery. R.S.O. 1960, c. 358, s. 3, *amended*.

Contract,
how made

4. Subject to this Act and any statute in that behalf, a contract of sale may be made in writing, either with or without seal, or by word of mouth or partly in writing and partly by word of mouth, or may be implied from the conduct of the parties, but

nothing in this section affects the law relating to corporations. R.S.O. 1960, c. 358, s. 4.

5.—(1) A contract for the sale of goods of the value of \$40 or more is not enforceable by action unless the buyer accepts part of the goods so sold and actually receives them, or gives something in earnest to bind the contract or in part payment, or unless some note or memorandum in writing of the contract is made and signed by the party to be charged or his agent in that behalf. Contracts for \$40 or more

(2) This section applies to every such contract notwithstanding that the goods may be intended to be delivered at some future time, or may not at the time of the contract be actually made, procured, or provided, or fit or ready for delivery, or some act may be requisite for the making or completing thereof, or rendering them fit for delivery. Future delivery

(3) There is an acceptance of goods within the meaning of this section when the buyer does any act in relation to the goods that recognizes a pre-existing contract of sale, whether there is an acceptance in performance of the contract or not. R.S.O. 1960, c. 358, s. 5, *amended*. Acceptance of goods, what constitutes

6.—(1) The goods that form the subject of a contract of sale may be either existing goods owned or possessed by the seller or goods to be manufactured or acquired by the seller after the making of the contract of sale, in this Act called "future goods". What goods may be subject of contract

(2) There may be a contract for the sale of goods the acquisition of which by the seller depends upon a contingency that may or may not happen. Contingency

(3) Where by a contract of sale the seller purports to effect a present sale of future goods, the contract operates as an agreement to sell the goods. R.S.O. 1960, c. 358, s. 6. Sale of future goods

7. Where there is a contract for the sale of specific goods and the goods without the knowledge of the seller have perished at the time the contract is made, the contract is void. R.S.O. 1960, c. 358, s. 7. Goods that have perished

8. Where there is an agreement to sell specific goods and subsequently the goods without any fault of the seller or buyer perish before the risk passes to the buyer, the agreement is thereby avoided. R.S.O. 1960, c. 358, s. 8. Goods perishing before sale but after agreement to sell

9.—(1) The price in a contract of sale may be fixed by the contract or may be left to be fixed in manner thereby agreed or may be determined by the course of dealing between the parties. Price determined

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Chap. 421

SALE OF GOODS

Sec. 9 (2)

Where
price not
determined

(2) Where the price is not determined in accordance with the foregoing provisions, the buyer shall pay a reasonable price, and what constitutes a reasonable price is a question of fact dependent on the circumstances of each particular case. R.S.O. 1960, c. 358, s. 9.

Agreement
to sell at
valuation

10.—(1) Where there is an agreement to sell goods on the terms that the price is to be fixed by the valuation of a third party and the third party cannot or does not make the valuation, the agreement is avoided, but if the goods or any part thereof have been delivered to and appropriated by the buyer, he shall pay a reasonable price therefor.

Valuation
prevented
by act of
party

(2) Where the third party is prevented from making the valuation by the fault of the seller or buyer, the party not in fault may maintain an action for damages against the party in fault. R.S.O. 1960, c. 358, s. 10.

Stipulations
as to time

11. Unless a different intention appears from the terms of the contract, stipulations as to time of payment are not of the essence of a contract of sale, and whether any other stipulation as to time is of the essence of the contract or not depends on the terms of the contract. R.S.O. 1960, c. 358, s. 11, *amended*.

When
condition
to be
treated a
warranty

12.—(1) Where a contract of sale is subject to a condition to be fulfilled by the seller, the buyer may waive the condition or may elect to treat the breach of the condition as a breach of warranty and not as a ground for treating the contract as repudiated.

Stipulation
which may be
condition or
warranty

(2) Whether a stipulation in a contract of sale is a condition the breach of which may give rise to a right to treat the contract as repudiated or a warranty the breach of which may give rise to a claim for damages but not to a right to reject the goods and treat the contract as repudiated depends in each case on the construction of the contract, and a stipulation may be a condition, though called a warranty in the contract.

Where
breach of
condition to
be treated
as breach of
warranty

(3) Where a contract of sale is not severable and the buyer has accepted the goods or part thereof, or where the contract is for specific goods the property in which has passed to the buyer, the breach of any condition to be fulfilled by the seller can only be treated as a breach of warranty and not as a ground for rejecting the goods and treating the contract as repudiated, unless there is a term of the contract, express or implied, to that effect.

Fulfillment
excused by
impossibility

(4) Nothing in this section affects the case of a condition or warranty, fulfillment of which is excused by law by reason of impossibility or otherwise. R.S.O. 1960, c. 358, s. 12.

Implied
conditions
and
warranties

13. In a contract of sale, unless the circumstances of the contract are such as to show a different intention, there is,

- (a) an implied condition on the part of the seller than in the case of a sale he has a right to sell the goods, and that in the case of an agreement to sell he will have a right to sell the goods at the time when the property is to pass;
- (b) an implied warranty that the buyer will have and enjoy quiet possession of the goods; and
- (c) an implied warranty that the goods will be free from any charge or encumbrance in favour of any third party, not declared or known to the buyer before or at the time when the contract is made. R.S.O. 1960, c. 358, s. 13.

14. Where there is a contract for the sale of goods by description, there is an implied condition that the goods will correspond with the description, and, if the sale is by sample as well as by description, it is not sufficient that the bulk of the goods corresponds with the sample if the goods do not also correspond with the description. R.S.O. 1960, c. 358, s. 14.

15. Subject to this Act and any statute in that behalf, there is no implied warranty or condition as to the quality or fitness for any particular purpose of goods supplied under a contract of sale, except as follows:

1. Where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required so as to show that the buyer relies on the seller's skill or judgment, and the goods are of a description that it is in the course of the seller's business to supply (whether he is the manufacturer or not), there is an implied condition that the goods will be reasonably fit for such purpose, but in the case of a contract for the sale of a specified article under its patent or other trade name there is no implied condition as to its fitness for any particular purpose.
2. Where goods are bought by description from a seller who deals in goods of that description (whether he is the manufacturer or not), there is an implied condition that the goods will be of merchantable quality, but if the buyer has examined the goods, there is no implied condition as regards defects that such examination ought to have revealed.
3. An implied warranty or condition as to quality or fitness for a particular purpose may be annexed by the usage of trade.
4. An express warranty or condition does not negative a warranty or condition implied by this Act unless inconsistent therewith. R.S.O. 1960, c. 358, s. 15.

Sale by
sample

16.—(1) A contract of sale is a contract for sale by sample where there is a term in the contract, express or implied, to that effect.

Implied
conditions

(2) In the case of a contract for sale by sample, there is an implied condition,

- (a) that the bulk will correspond with the sample in quality;
- (b) that the buyer will have a reasonable opportunity of comparing the bulk with the sample; and
- (c) that the goods will be free from any defect rendering them unmerchantable that would not be apparent on reasonable examination of the sample. R.S.O. 1960, c. 358, s. 16.

PART II

EFFECTS OF THE CONTRACT

Goods
must be
ascertained

17. Where there is a contract for the sale of unascertained goods, no property in the goods is transferred to the buyer until the goods are ascertained. R.S.O. 1960, c. 358, s. 17, *amended*.

Property
passes where
intended
to pass

18.—(1) Where there is a contract for the sale of specific or ascertained goods, the property in them is transferred to the buyer at such time as the parties to the contract intend it to be transferred.

Ascertaining
intention

(2) For the purpose of ascertaining the intention of the parties regard shall be had to the terms of the contract, the conduct of the parties and the circumstances of the case. R.S.O. 1960, c. 358, s. 18.

Rules for
ascertaining
intention

19. Unless a different intention appears, the following are rules for ascertaining the intention of the parties as to the time at which the property in the goods is to pass to the buyer:

Rule 1.—Where there is an unconditional contract for the sale of specific goods in a deliverable state, the property in the goods passes to the buyer when the contract is made and it is immaterial whether the time of payment or the time of delivery or both is postponed.

Rule 2.—Where there is a contract for the sale of specific goods and the seller is bound to do something to the goods for the purpose of putting them into a deliverable state, the property does not pass until such thing is done and the buyer has notice thereof.

Rule 3.—Where there is a contract for the sale of specific goods in a deliverable state but the seller is bound to weigh, measure, test or do some other act or thing with reference to the goods for the purpose of ascertaining the price, the property does not pass until such act or thing is done and the buyer has notice thereof.

Rule 4.—When goods are delivered to the buyer on approval or "on sale or return" or other similar terms, the property therein passes to the buyer:

- (i) when he signifies his approval or acceptance to the seller or does any other act adopting the transaction;
- (ii) if he does not signify his approval or acceptance to the seller but retains the goods without giving notice of rejection, then if a time has been fixed for the return of the goods, on the expiration of such time, and, if no time has been fixed, on the expiration of a reasonable time, and what is a reasonable time is a question of fact.

Rule 5.—(i) Where there is a contract for the sale of unascertained or future goods by description and goods of that description and in a deliverable state are unconditionally appropriated to the contract, either by the seller with the assent of the buyer, or by the buyer with the assent of the seller, the property in the goods thereupon passes to the buyer, and such assent may be expressed or implied and may be given either before or after the appropriation is made.

- (ii) Where in pursuance of the contract the seller delivers the goods to the buyer or to a carrier or other bailee (whether named by the buyer or not) for the purpose of transmission to the buyer and does not reserve the right of disposal, he shall be deemed to have unconditionally appropriated the goods to the contract. R.S.O. 1960, c. 358, s. 19, amended.

20.—(1) Where there is a contract for the sale of specific goods or where goods are subsequently appropriated to the contract, the seller may, by the terms of the contract or appropriation, reserve the right of disposal of the goods until certain conditions are fulfilled, and in such case, notwithstanding the delivery of the goods to the buyer or to a carrier or other bailee for the purpose of transmission to the buyer, the property in the goods does not pass to the buyer until the conditions imposed by the seller have been fulfilled. R.S.O. 1960, c. 358, s. 20 (1).

(2) Where goods are shipped and by the bill of lading the goods are deliverable to the order of the seller or his agent, the seller

Reservation
of right of
disposal

Goods
deliverable
to order
of seller

prima facie reserves the right of disposal. R.S.O. 1960, c. 358, s. 20 (2), amended.

Where seller
draws on
buyer and
sends draft
with bill of
lading

(3) Where the seller of goods draws on the buyer for the price and transmits the bill of exchange and bill of lading to the buyer together to secure acceptance or payment of the bill of exchange, the buyer is bound to return the bill of lading if he does not honour the bill of exchange, and if he unlawfully retains the bill of lading, the property in the goods does not pass to him. R.S.O. 1960, c. 358, s. 20 (3).

Risk
prima facie
passes with
property

21. Unless otherwise agreed, the goods remain at the seller's risk until the property therein is transferred to the buyer, but, when the property therein is transferred to the buyer, the goods are at the buyer's risk whether delivery has been made or not, but,

- (a) where delivery has been delayed through the fault of either the buyer or seller, the goods are at the risk of the party in fault as regards any loss that might not have occurred but for such fault; and
- (b) nothing in this section affects the duties or liabilities of either seller or buyer as a bailee of the goods of the other party. R.S.O. 1960, c. 358, s. 21.

Sale by
person other
than owner

22. Subject to this Act, where goods are sold by a person who is not the owner thereof and who does not sell them under the authority or with the consent of the owner, the buyer acquires no better title to the goods than the seller had, unless the owner of the goods is by his conduct precluded from denying the seller's authority to sell but nothing in this Act affects,

R.S.O. 1970,
c. 156

- (a) *The Factors Act* or any enactment enabling the apparent owner of goods to dispose of them as if he were the true owner thereof; or
- (b) the validity of any contract of sale under any special common law or statutory power of sale or under the order of a court of competent jurisdiction. R.S.O. 1960, c. 358, s. 22.

Law as to
market
overt does
not apply

23. The law relating to market overt does not apply to a sale of goods that takes place in Ontario. R.S.O. 1960, c. 358, s. 23.

Sale under
voidable
title

24. When the seller of goods has a voidable title thereto but his title has not been avoided at the time of the sale, the buyer acquires a good title to the goods, if he buys them in good faith and without notice of the seller's defective title. R.S.O. 1960, c. 358, s. 24.

Seller in
possession
after sale

25.—(1) Where a person having sold goods continues or is in possession of the goods or of the documents of title to the goods, the delivery or transfer by that person, or by a mercantile agent

acting for him, of the goods or documents of title under a sale, pledge or other disposition thereof to a person receiving the goods or documents of title in good faith and without notice of the previous sale, has the same effect as if the person making the delivery or transfer were expressly authorized by the owner of the goods to make the delivery or transfer.

(2) Where a person having bought or agreed to buy goods obtains, with the consent of the seller, possession of the goods or the documents of title to the goods, the delivery or transfer by that person, or by a mercantile agent acting for him, of the goods or documents of title, under a sale, pledge or other disposition thereof to a person receiving the goods or documents of title in good faith and without notice of any lien or other right of the original seller in respect of the goods, has the same effect as if the person making the delivery or transfer were a mercantile agent in possession of the goods or documents of title with the consent of the owner. R.S.O. 1960, c. 358, s. 25 (1, 2), amended. Buyer in possession after sale

(3) Subject to subsection 5, subsection 2 does not apply to goods the possession of which has been obtained by a buyer under a security agreement whereby the seller retains a security interest within the meaning of *The Personal Property Security Act*, and the rights of the parties shall be determined by that Act. 1967, c. 89, s. 1. Security interests excepted
R.S.O. 1970, c. 344

(4) In this section, "mercantile agent" means a mercantile agent having, in the customary course of his business as such agent, authority either to sell goods or to consign goods for the purpose of sale, or to buy goods, or to raise money on the security of goods. R.S.O. 1960, c. 358, s. 25 (3). Interpretation

(5) Subsection 3 comes into force on a day to be named by the Lieutenant Governor by his proclamation. 1967, c. 89, s. 2. Commencement of subs. 3

PART III

PERFORMANCE OF THE CONTRACT

26. It is the duty of the seller to deliver the goods and of the buyer to accept and pay for them in accordance with the terms of the contract of sale. R.S.O. 1960, c. 358, s. 26. Duties of seller and buyer

27. Unless otherwise agreed, delivery of the goods and payment of the price are concurrent conditions, that is to say, the seller shall be ready and willing to give possession of the goods to the buyer in exchange for the price and the buyer shall be ready and willing to pay the price in exchange for possession of the goods. R.S.O. 1960, c. 358, s. 27. Payment and delivery concurrent

28.—(1) Whether it is for the buyer to take possession of the goods or for the seller to send them to the buyer is a question Rules as to delivery

depending in each case on the contract, express or implied, between the parties, and apart from any such contract, express or implied, the place of delivery is the seller's place of business, if he has one, and if not, his residence, but where the contract is for the sale of specific goods that to the knowledge of the parties, when the contract is made, are in some other place, then that place is the place of delivery.

Where no time for delivery fixed

(2) Where under the contract of sale the seller is bound to send the goods to the buyer but no time for sending them is fixed, the seller is bound to send them within a reasonable time.

Where goods in possession of third person

(3) Where the goods at the time of sale are in the possession of a third person, there is no delivery by the seller to the buyer unless and until such third person acknowledges to the buyer that he holds the goods on his behalf, but nothing in this section affects the operation of the issue or transfer of any document of title to goods.

Demand or tender of delivery

(4) Demand or tender of delivery may be treated as ineffectual unless made at a reasonable hour, and what is a reasonable hour is a question of fact.

Expenses of putting goods in deliverable state

(5) Unless otherwise agreed, the expenses of and incidental to putting the goods in a deliverable state shall be borne by the seller. R.S.O. 1960, c. 358, s. 28.

Delivery of wrong quantity

29.—(1) Where the seller delivers to the buyer a quantity of goods less than he contracted to sell, the buyer may reject them, but if the buyer accepts the goods so delivered, he shall pay for them at the contract rate.

Where quantity larger than contracted for

(2) Where the seller delivers to the buyer a quantity of goods larger than he contracted to sell, the buyer may accept the goods included in the contract and reject the rest, or he may reject the whole, and if the buyer accepts the whole of the goods so delivered, he shall pay for them at the contract rate. R.S.O. 1960, c. 358, s. 29 (1, 2).

Goods not in accordance with contract

(3) Where the seller delivers to the buyer the goods he contracted to sell mixed with goods of a different description not included in the contract, the buyer may accept the goods that are in accordance with the contract and reject the rest, or he may reject the whole.

Exceptions as to trade customs, etc.

(4) This section is subject to any usage of trade, special agreement or course of dealing between the parties. R.S.O. 1960, c. 358, s. 29 (3, 4).

Delivery by instalments

30.—(1) Unless otherwise agreed, the buyer of goods is not bound to accept delivery thereof by instalments.

(2) Where there is a contract for the sale of goods to be delivered by stated instalments that are to be separately paid for and the seller makes defective deliveries in respect of one or more instalments or fails to deliver one or more instalments or the buyer neglects or refuses to take delivery of or pay for one or more instalments, it is a question in each case depending on the terms of the contract and the circumstances of the case whether the breach of contract is a repudiation of the whole contract or whether it is a severable breach giving rise to a claim for compensation but not to a right to treat the whole contract as repudiated. R.S.O. 1960, c. 358, s. 30.

Where instalments are not delivered as contracted for

31.—(1) Where in pursuance of a contract of sale the seller is authorized or required to send the goods to the buyer, the delivery of the goods to a carrier whether named by the buyer or not, for the purpose of transmission to the buyer, is *prima facie* a delivery of the goods to the buyer. R.S.O. 1960, c. 358, s. 31 (1).

Delivery to carrier

(2) Unless otherwise authorized by the buyer, the seller shall make a contract with the carrier on behalf of the buyer that is reasonable having regard to the nature of the goods and the other circumstances of the case, and if the seller omits so to do and the goods are lost or damaged in course of transit, the buyer may decline to treat the delivery to the carrier as a delivery to himself or may hold the seller responsible in damages. R.S.O. 1960, c. 358, s. 31 (2).

Seller's contract with carrier

32. Where the seller of goods agrees to deliver them at his own risk at a place other than that where they are when sold, the buyer nevertheless, unless otherwise agreed, takes any risk of deterioration in the goods necessarily incident to the course of transit. R.S.O. 1960, c. 358, s. 32, *amended*.

Agreement for delivery elsewhere than at place of sale

33.—(1) Where goods are delivered to the buyer that he has not previously examined, he shall be deemed not to have accepted them until he has had a reasonable opportunity of examining them for the purpose of ascertaining whether they are in conformity with the contract.

Rights of buyer as to examination

(2) Unless otherwise agreed, when the seller tenders delivery of goods to the buyer, he shall, on request, afford the buyer a reasonable opportunity of examining the goods for the purpose of ascertaining whether they are in conformity with the contract. R.S.O. 1960, c. 358, s. 33, *amended*.

Seller to afford opportunity for examination

34. The buyer shall be deemed to have accepted the goods when he intimates to the seller that he has accepted them, or when the goods have been delivered to him and he does any act in relation to them that is inconsistent with the ownership of the seller, or when, after the lapse of a reasonable time, he retains the

Acceptance of goods

goods without intimating to the seller that he has rejected them. R.S.O. 1960, c. 358, s. 34, *amended*.

Effect of
refusal to
accept

35. Unless otherwise agreed, where goods are delivered to the buyer and he refuses to accept them, having the right so to do, he is not bound to return them to the seller, but it is sufficient if he intimates to the seller that he refuses to accept them. R.S.O. 1960, c. 358, s. 35.

Wrongful
neglect or
refusal to
take
delivery

36. When the seller is ready and willing to deliver the goods and requests the buyer to take delivery and the buyer does not within a reasonable time after such request take delivery of the goods, he is liable to the seller for any loss occasioned by his neglect or refusal to take delivery, and also for a reasonable charge for the care and custody of the goods, but nothing in this section affects the rights of the seller where the neglect or refusal of the buyer to take delivery amounts to a repudiation of the contract. R.S.O. 1960, c. 358, s. 36.

PART IV

RIGHTS OF UNPAID SELLER AGAINST THE GOODS

Interpre-
tation

37.—(1) The seller of goods shall be deemed to be an "unpaid seller" within the meaning of this Act,

- (a) when the whole of the price has not been paid or tendered;
- (b) when a bill of exchange or other negotiable instrument has been received as conditional payment and the condition on which it was received has not been fulfilled by reason of the dishonour of the instrument or otherwise. R.S.O. 1960, c. 358, s. 37 (1).

Idem

(2) In this Part, "seller" includes a person who is in the position of a seller, as for instance an agent of the seller to whom the bill of lading has been endorsed, or a consignor or agent who has himself paid or is directly responsible for the price. R.S.O. 1960, c. 358, s. 37 (2).

Rights of
unpaid
seller

38.—(1) Subject to this Act and any statute in that behalf, notwithstanding that the property in the goods may have passed to the buyer, the unpaid seller of goods, as such, has by implication of law,

- (a) a lien on the goods or right to retain them for the price while he is in possession of them;
- (b) in case of the insolvency of the buyer, a right of stopping the goods in transitu after he has parted with the possession of them;

(c) a right of resale as limited by this Act.

(2) Where the property in goods has not passed to the buyer, ^{Withholding delivery} the unpaid seller has, in addition to his other remedies, a right of withholding delivery similar to and co-extensive with the rights of lien and stoppage in transitu where the property has passed to the buyer. R.S.O. 1960, c. 358, s. 38.

39.—(1) Subject to this Act, the unpaid seller of goods who is ^{Unpaid seller's lien} in possession of them is entitled to retain possession of them until payment or tender of the price,

- (a) where the goods have been sold without any stipulation as to credit;
- (b) where the goods have been sold on credit but the term of credit has expired; or
- (c) where the buyer becomes insolvent.

(2) The seller may exercise his right of lien notwithstanding ^{Seller in possession as agent} that he is in possession of the goods as agent or bailee for the buyer. R.S.O. 1960, c. 358, s. 39.

40. Where an unpaid seller has made part delivery of the ^{Where part delivery has been made} goods, he may exercise his right of lien or retention on the remainder unless the part delivery has been made under such circumstances as show an agreement to waive the lien or right of retention. R.S.O. 1960, c. 358, s. 40.

41.—(1) The unpaid seller of goods loses his lien or right of ^{Termination of lien} retention thereon,

- (a) when he delivers the goods to a carrier or other bailee for the purpose of transmission to the buyer without reserving the right of disposal of the goods;
- (b) when the buyer or his agent lawfully obtains possession of the goods; or
- (c) by waiver thereof.

(2) The unpaid seller of goods having a lien or right of retention ^{Lien not lost by obtaining judgment for price} thereon does not lose his lien or right of retention by reason only that he has obtained judgment for the price of the goods. R.S.O. 1960, c. 358, s. 41.

42. Subject to this Act, when the buyer of goods becomes ^{Right of stoppage in transitu} insolvent, the unpaid seller who has parted with the possession of the goods has the right of stopping them in transitu, that is to say, he may resume possession of the goods as long as they are in course of transit, and may retain them until payment or tender of the price. R.S.O. 1960, c. 358, s. 42.

Duration
of transit

43.—(1) Goods shall be deemed to be in course of transit from the time they are delivered to a carrier by land or water or other bailee for the purpose of transmission to the buyer until the buyer or his agent in that behalf takes delivery of them from such carrier or other bailee.

Buyer
obtaining
delivery

(2) If the buyer or his agent in that behalf obtains delivery of the goods before their arrival at the appointed destination the transit is at an end.

Carrier
holding
goods to
buyer's
order

(3) If after the arrival of the goods at the appointed destination the carrier or other bailee acknowledges to the buyer or his agent that he holds the goods on his behalf and continues in possession of them as bailee for the buyer or his agent, the transit is at an end and it is immaterial that a further destination for the goods may have been indicated by the buyer.

Rejected
goods

(4) If the goods are rejected by the buyer and the carrier or other bailee continues in possession of them, the transit shall be deemed not to be at an end even if the seller has refused to receive them back.

Ship
chartered
by buyer

(5) When goods are delivered to a ship chartered by the buyer, it is a question depending on the circumstances of the particular case whether they are in the possession of the master as a carrier or as agent to the buyer.

Wrongful
refusal to
deliver

(6) Where the carrier or other bailee wrongfully refuses to deliver the goods to the buyer or his agent in that behalf, the transit shall be deemed to be at an end.

Where part
delivery
has been
made

(7) Where part delivery of the goods has been made to the buyer or his agent in that behalf, the remainder of the goods may be stopped in transitu unless the part delivery has been made under such circumstances as show an agreement to give up possession of the whole of the goods. R.S.O. 1960, c. 358, s. 43.

How right
may be
exercised

44.—(1) The unpaid seller may exercise his right of stoppage in transitu either by taking actual possession of the goods or by giving notice of his claim to the carrier or other bailee in whose possession the goods are, and such notice may be given either to the person in actual possession of the goods or to his principal, and in the latter case the notice to be effectual shall be given at such time and under such circumstances that the principal by the exercise of reasonable diligence may communicate it to his servant or agent in time to prevent a delivery to the buyer.

Redelivery
after
notice to
carrier, etc.

(2) When notice of stoppage in transitu is given by the seller to the carrier or other bailee in possession of the goods, he shall redeliver the goods to or according to the directions of the seller, and the expenses of such redelivery shall be borne by the seller. R.S.O. 1960, c. 358, s. 44.

45. Subject to this Act, the unpaid seller's right of lien or retention or stoppage in transitu is not affected by any sale of other disposition of the goods that the buyer may have made, unless the seller has assented thereto, but where a document of title to goods has been lawfully transferred to a person as buyer or owner of the goods and that person transfers the document to a person who takes the document in good faith and for valuable consideration, then, if the last-mentioned transfer was by way of sale, the unpaid seller's right of lien or retention or stoppage in transitu is defeated, and if the last-mentioned transfer was by way of pledge or other disposition for value, the unpaid seller's right of lien or retention or stoppage in transitu can only be exercised subject to the rights of the transferee. R.S.O. 1960, c. 358, s. 45.

Effect of
subsale or
pledge by
buyer

46.—(1) Subject to this section, a contract of sale is not rescinded by the mere exercise by an unpaid seller of his right of lien or retention or stoppage in transitu.

Exercise of
right of
lien or
stoppage,
effect on
contract

(2) Where an unpaid seller who has exercised his right of lien or retention or stoppage in transitu resells the goods, the buyer acquires a good title thereto as against the original buyer.

Title of
buyer on
resale

(3) Where the goods are of a perishable nature or where the unpaid seller gives notice to the buyer of his intention to resell and the buyer does not within a reasonable time pay or tender the price, the unpaid seller may resell the goods and recover from the original buyer damages for any loss occasioned by his breach of contract.

Resale and
right to
damages
for breach
of contract

(4) Where the seller expressly reserves a right of resale in case the buyer should make default, and on the buyer making default, resells the goods, the original contract of sale is thereby rescinded, but without prejudice to any claim the seller may have for damages. R.S.O. 1960, c. 358, s. 46.

Where
resale
rescinds
contract

PART V

ACTIONS FOR BREACH OF THE CONTRACT

47.—(1) Where, under a contract of sale the property in the goods has passed to the buyer and the buyer wrongfully neglects or refuses to pay for the goods according to the terms of the contract, the seller may maintain an action against him for the price of the goods.

Seller may
maintain
action for
price

(2) Where under a contract of sale the price is payable on a day certain, irrespective of delivery, and the buyer wrongfully neglects or refuses to pay the price, the seller may maintain an action for the price although the property in the goods has not passed.

Where
property
in goods
has not
passed

passed and the goods have not been appropriated to the contract. R.S.O. 1960, c. 358, s. 47.

Action for
non-
acceptance

48.—(1) Where the buyer wrongfully neglects or refuses to accept and pay for the goods, the seller may maintain an action against him for damages for non-acceptance.

Measure of
damages

(2) The measure of damages is the estimated loss directly and naturally resulting in the ordinary course of events from the buyer's breach of contract.

Difference
in price

(3) Where there is an available market for the goods in question, the measure of damages is *prima facie* to be ascertained by the difference between the contract price and the market or current price at the time or times when the goods ought to have been accepted, or, if no time was fixed for acceptance, then at the time of the refusal to accept. R.S.O. 1960, c. 358, s. 48.

Buyer may
maintain
action for
non-delivery

49.—(1) Where the seller wrongfully neglects or refuses to deliver the goods to the buyer, the buyer may maintain an action against the seller for damages for non-delivery.

Measure of
damages

(2) The measure of damages is the estimated loss directly and naturally resulting in the ordinary course of events from the seller's breach of contract.

Difference
in price

(3) Where there is an available market for the goods in question, the measure of damages is *prima facie* to be ascertained by the difference between the contract price and the market or current price of the goods at the time or times when they ought to have been delivered, or, if no time was fixed, then at the time of the refusal to deliver. R.S.O. 1960, c. 358, s. 49.

Specific
performance

50. In an action for breach of contract to deliver specific or ascertained goods, the court may, if it thinks fit, direct that the contract be performed specifically, without giving the defendant the option of retaining the goods on payment of damages, and may impose such terms and conditions as to damages, payment of the price, and otherwise, as to the court seems just. R.S.O. 1960, c. 358, s. 50.

Breach of
warranty

51.—(1) Where there is a breach of warranty by the seller, or where the buyer elects, or is compelled, to treat a breach of a condition on the part of the seller as a breach of warranty, the buyer is not by reason only of such breach of warranty entitled to reject the goods, but he may,

- (a) set up against the seller the breach of warranty in diminution or extinction of the price; or
- (b) maintain an action against the seller for damages for the breach of warranty.

(2) The measure of damages for breach of warranty is the estimated loss directly and naturally resulting in the ordinary course of events from the breach of warranty. Measure of damages

(3) In the case of breach of warranty of quality, such loss is *prima facie* the difference between the value of the goods at the time of delivery to the buyer and the value they would have had if they had answered to the warranty. Breach of warranty as to quality

(4) The fact that the buyer has set up the breach of warranty in diminution or extinction of the price does not prevent him from maintaining an action for the same breach of warranty if he has suffered further damage. R.S.O. 1960, c. 358, s. 51. Right of action

52. Nothing in this Act affects the right of the buyer or the seller to recover interest or special damages in a case where by law interest or special damages may be recoverable, or to recover money paid where the consideration for the payment of it has failed. R.S.O. 1960, c. 358, s. 52. Other rights of buyer preserved

PART VI

SUPPLEMENTARY

53. Where any right, duty or liability would arise under a contract of sale by implication of law, it may be negatived or varied by express agreement or by the course of dealing between the parties, or by usage, if the usage is such as to bind both parties to the contract. R.S.O. 1960, c. 358, s. 53. Exclusion of implied laws and conditions

54. Where by this Act any reference is made to a "reasonable time", the question of what is a reasonable time is a question of fact. R.S.O. 1960, c. 358, s. 54. Reasonable time a question of fact

55. Where any right, duty or liability is declared by this Act, it may, unless otherwise provided by this Act, be enforced by action. R.S.O. 1960, c. 358, s. 55. Rights enforceable by action

56. In case of a sale by auction, Sales by auction

- (a) where goods are put up for sale in lots, each lot is *prima facie* the subject of a separate contract of sale;
- (b) a sale is complete when the auctioneer announces its completion by the fall of a hammer or in any other customary manner, and until such announcement is made any bidder may retract his bid;
- (c) where a sale is not notified to be subject to a right to bid on behalf of the seller, it is not lawful for the seller to bid himself or to employ a person to bid at such sale, or for the auctioneer knowingly to take any bid from the seller

or any such person, and any sale contravening this rule may be treated as fraudulent by the buyer;

- (d) a sale may be notified to be subject to a reserved or upset price, and a right to bid may also be reserved expressly by or on behalf of the seller;
- (e) where a right to bid is expressly reserved, but not otherwise, the seller, or any one person on his behalf, may bid at the auction. R.S.O. 1960, c. 358, s. 56, amended.

Application
of common
law and law
merchant

57.—(1) The rules of the common law, including the law merchant, except in so far as they are inconsistent with the express provisions of this Act, and in particular the rules relating to the law of principal and agent and the effect of fraud, misrepresentation, duress or coercion, mistake or other invalidating cause, continue to apply to contracts for the sale of goods. R.S.O. 1960, c. 358, s. 57 (1), amended.

Bills of sale,
etc., not
affected

(2) Nothing in this Act affects enactments relating to conditional sales, bills of sale or chattel mortgages.

Act not to
apply to
mortgages,
etc.

(3) The provisions of this Act relating to contracts of sale do not apply to any transaction in the form of a contract of sale that is intended to operate by way of mortgage, pledge, charge or other security. R.S.O. 1960, c. 358, s. 57 (2, 3).

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to settle the share or interest of the 3 daughters by the first marriage in their father's estate, the execution by the 2 daughters who signed must have been tentative, and must have been intended to become complete only when, the amount to be paid to Mrs. Rawn having been settled, Mrs. Rawn had joined in executing the deed. Several cases as to the effect of documents executed by some only of the persons intended to be bound are cited in 7 Hals., p. 336, but they differ in their facts from the present case; of which they cannot be said to be decisive, and no case was cited to me, nor have I found one, which is directly in point. It would seem, however, on principle that some of the persons named as joining in a covenant (although the covenant is expressed to be made by them and each of them) cannot be bound where others who are named, and whose concurrence is necessary to the accomplishment of the object recited in the deed, have not joined. For this reason, I am of opinion that the defendant has failed to meet the case made by the plaintiff's proof of her father's death intestate, and that the plaintiff is entitled to the declaration asked for, with costs.

Judgment for the plaintiff.

SASKATCHEWAN CO-OP. WHEAT PRODUCERS, Ltd. v. ZUROWSKI.

Saskatchewan Court of Appeal, Haultain, C.J.S., Lamont, Turgeon, McKay and Martin, JJA. June 21, 1926.

Contracts III E—Restraint of trade—Validity—Reasonableness.

A contract in restraint of trade is not unenforceable where the restraint is reasonable as between the parties considering the interests necessary to be protected, and is not unreasonably prejudicial to the interests of the public generally.

Contracts II A—Construction—Stipulation of liquidated damages—Validity.

A sum stipulated in a contract by way of liquidated damages, is not to be construed as a penalty, where a breach of the contract would undoubtedly cause damage, but such damage would be difficult to prove, and the amount stipulated bears a reasonable relation to the damage which would result from such breach.

[See Annotation, 45 D.L.R. 24].

APPEAL by the plaintiff from the judgment of Embury, J., [1926] 1 D.L.R. 770, dismissing the action. Reversed.

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G. H. Barr, K.C., and R. H. Milliken, for appellant.
A. G. MacKinnon and H. A. Rutherford, for respondent.

HAULTAIN, C.J.S., concurs with LAMONT, J.A.

LAMONT, J.A.:—The plaintiffs in this action, whom I shall hereafter designate as the "Pool," are a corporation, the shareholders of which are the members of what is commonly known as the Saskatchewan Wheat Pool. The defendant is one of those who signed the Pool contract. The Pool is suing to recover damages from the defendant for breach of his contract to deliver to the Pool a carload of wheat grown by him in the year 1924. It was a term of the contract that the defendant would up to and including the year 1927 deliver to the Pool all wheat produced or acquired by or for him in the Province of Saskatchewan, except what might be required for his food, seed and feed. It was also a term of the contract that he would appoint the Pool his sole and exclusive agent to receive, transport, and market his wheat. On its part the Pool agreed to act as the agent of the defendant for these purposes, as well as the agent of every other wheat-grower who should enter into a similar contract, and that, upon the wheat being sold, it would distribute the net proceeds of the wheat of all the Pool members ratably among such members, after making certain deductions, which it was agreed should be retained. It was a further term of the contract that, should the defendant fail to deliver to the Pool the wheat grown or acquired by him within the Province, he would pay to it as liquidated damages the sum of 25c per bus. for all wheat covered by the contract which he failed to deliver. The defendant admits that in 1924 he produced 1590 bus. of wheat which he failed to deliver to the Pool, and which he sold to another company. It is for this breach of the contract that the plaintiff now claims damages. The amount claimed is 25c per bus. on 1590 bus., or \$397.50 in all.

The defendant resists payment of the Pool's claim on several grounds:—1. That there was no completed contract between the plaintiff and himself, inasmuch as the plaintiff had never notified him that it accepted his offer to become a party to the contract, nor was there any allotment of stock in the plaintiff corporation made to him as provided in the contract; 2. That the plaintiff had not taken out a licence as a primary grain dealer under the Canada Grain Act, 1912 (Can.), c. 27; 3. That the contract was unenforceable, as being in restraint of trade.

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In addition the defendant contends that, even if he is liable on the contract, the 25c per bus. specified to be liquidated damages is in reality a penalty, and the Pool is entitled to recover only its actual loss, which would amount to some \$90.

The trial Judge, Embury, J., [1926] 1 D.L.R. 170, gave effect to the first of the above defences, holding (pp. 781-2) that the signing of the contract by the defendant and the sending of it to the corporation amounted only to an offer on the part of the defendant to enter into a contract; and that, although the Pool by its proper officer did sign the contract and thereby accepted the offer, it never communicated its acceptance to the defendant, and that without such communication the document signed never became effective as a contract. He also held that the defendant could not "have a share of stock allotted to him without being notified that it has in fact been allotted."

With deference, I am of opinion that the trial Judge was wrong in holding that there had been no completed contract. The Pool's agent, Bristow, was duly authorized to go among the farmers and to obtain contracts from them. He obtained the defendant's signature to the contract in question. When the defendant signed, he understood the contract to be binding upon him from that moment, subject to the obtaining of similar contracts covering 50% of the total acreage of wheat in the Province in 1923. That he did not consider his signature to the contract to be an offer merely is seen from the fact that, immediately after signing the contract in question, he signed also a supplementary agreement, which contained the following:—"Whereas the grower has entered into an agreement with the Association respecting the marketing of wheat.

"And Whereas it is expedient that such agreement be modified as herein more particularly set out.

"Now therefore this Indenture witnesseth, . . .

"2. The said agreement shall be read and construed and be effectual and binding for all intents and purposes as if it had been originally drawn as amended hereby."

It was a term of the contract in question that the defendant "covenants and agrees to and hereby does irrevocably apply for one share" of the capital stock of the plaintiff corporation, and "agrees to pay the par value thereof of \$1.00;" and the plaintiff covenanted to allot to him one share, provided the requisite number of contract-signers was obtained. When sufficient contracts had been signed, the Pool published the fact in

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the manner prescribed by the contract. The defendant asked for and obtained a ballot form, to which he was entitled only in case his contract with the Pool was complete, and he was a shareholder in the corporation. He used the ballot to elect representatives who would select the officers to carry on the business of the Pool. This conduct is only consistent with a recognition on part of the defendant that, once the requisite number of contract-signers had been obtained, the document signed by him was to constitute a binding contract, and not a mere offer. The asking for and acceptance of the ballot would have been notice to him that the contract was completed, if any notice beyond the publication made had been required. That the Pool did not notify him of the allotment of his share, beyond the sending of the ballot, is not, in my opinion, material. Under the contract the defendant could not revoke his application for a share, and the Pool was under contract to allot it to him. If it failed to do so, it would only be a breach of that covenant, but would not prevent the agreement which provided for this being done from becoming a binding contract. I am therefore of opinion that there was a completed contract between the Pool and the defendant.

The next ground of defence is, that by omitting to take out a licence as a primary grain dealer, under the Canada Grain Act, all handling of wheat by the Pool was illegal, and the contract was therefore unenforceable.

Section 119 (a) of the above Act, as re-enacted by 1919 (Can.), c. 40, s. 10, is as follows:—“(2) The Board shall,—(a) require all track-buyers and owners and operators of elevators, warehouses and mills, and all grain commission merchants and primary grain dealers to take out annual licenses.”

“Primary grain dealer” is defined by 1919 (Can.), c. 40, s. 1, as follows:—“(tt) ‘Primary Grain Dealer’ means any person, firm or corporation which contracts with the producer to purchase or handle grain for commerce, in any manner for which a license (other than a license for a Primary Grain Dealer) is not required under the provisions of this Act.”

Section 219A (1) provides that no person, firm or corporation, shall carry on the business of primary grain dealer without first having obtained a licence so to do from the Board; and s.s. (3) of that section provides that it shall be the duty of every primary grain dealer to make all contracts in writing in duplicate in the form “H” of the schedule to the Act. This form reads in part:—

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" _____ Station _____ 191
I (We) have this day purchased from _____
_____ of _____
(Name) (Address)
_____ bushels of _____
(Kind of grain)
_____ cents per bushel basis _____
in store Fort William or Port Arthur. Delivery to
be made in car(s) on track at _____ on or before
(Station)
_____ 191
Accepted by _____ Per _____
(Seller) (Buyer)

A reference to this form shows that it is not applicable to the Pool, for, under the contract, the Pool does not buy the wheat produced by the members of the corporation. The Pool is merely an agent of its shareholders. An agent with most extensive powers, it is true, but only an agent, representing some 50,000 individual principals who have agreed to join together for the purpose of selling their own wheat, and for that purpose have formed themselves into a corporate body of which each grower is a member. The Pool, as a corporation, is engaged simply in the marketing of the wheat grown by its own shareholders. If three adjoining farmers decided that they could more advantageously sell their wheat as one lot than by selling it individually, and two of them gave the third power of attorney to dispose of their wheat along with his own, and he did so, — would that make the selling farmer a "primary grain dealer" under the Act, and oblige him to take out a licence to sell the grain? I do not think it would. Neither do I think that if the first two agreed to allow their neighbour to retain a certain amount out of the proceeds of their respective shares to cover the extra expense of selling their grain, the obtaining of such amounts by the seller would make him a "commission merchant" within the meaning of the Act. Between the position of the farmer selling his neighbours' grain with his own and the position of the Pool as selling agent of its 50,000 shareholders, I cannot see any difference in principle. Neither selling agent is a buyer of the grain, as he is required to be under form "H," nor does either make a profit out of the operation; for although in the contract the Pool is authorized to retain not only the actual costs of marketing the grain but 2c a bushel for acquiring facilities for handling it, and 1% to form a commercial reserve, yet these were only for the purpose of covering

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the costs of marketing and the securing of sums deemed necessary by the contract-signers to provide the facilities for carrying to a successful conclusion the experiment of marketing co-operatively the wheat of 50,000 farmers. In my opinion the licensing provisions of the Canada Grain Act were never intended to apply either to a group of farmers marketing the grain grown by themselves through the agency of one or more of their members, or to a corporation composed only of producers marketing co-operatively only the grain grown or owned by its shareholders.

The remaining ground of defence is, that the contract is in restraint of trade and therefore unenforceable.

The clause of the contract upon which this argument is based is cl. 12, which reads:—"12. The Grower expressly covenants and agrees that he will not (save as herein permitted) sell or otherwise dispose of any of the wheat produced or acquired or owned by him in the Province of Saskatchewan during the life of this Agreement to any person or persons, firm or corporation other than this Association."

It is contended that this clause, by restricting the farmer from selling his wheat to any person or corporation except the Pool, is opposed to public policy, because it restricts the defendant's right to sell his wheat where he chooses, and also because it tends to unduly stifle competition and enhance the price.

The argument that the restriction tends to unduly stifle competition and enhance the price, is not in my opinion entitled to serious consideration. The evidence establishes that in 1924 fully 80% of the wheat handled by the Pool was sold direct to the millers and buyers in Europe, and that it is the European market which fixes the price, because the European countries are the buyers, and that, in selling in that market, the Pool has to compete with the sellers of every other wheat-exporting country. The evidence also discloses that the price is fixed in accordance with the economic law of supply and demand. These facts, in my opinion totally refute the argument that the restrictions of the contract can in any way unduly lessen competition or enhance the price. How can the price in the European market be affected by the fact that the wheat-growers of Saskatchewan are sending their wheat to that market through the Pool rather than through a privately owned corporation? The wheat must get on the market through some agency or it will not be sold, for the individual farmer cannot take it there himself. If, through the agency of the Pool the farmers of this Province can market their grain with less expense than it would

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otherwise cost them, and divide among themselves the profits which a private individual or concern would make by placing their wheat on the market, so much the better for the farmers. That is their right, and it cannot be considered as unduly lessening competition or enhancing the price (*Weidman v. Shragge* (1912), 2 D.L.R. 734, 20 Can. C.C. 117).

Then, is the clause against public policy because it restricts the defendant to marketing his wheat through the agency of the Pool up to and including the year 1927? There is no doubt that it is in restraint of trade, because it prohibits the defendant from disposing of his wheat as he pleases. But contracts in restraint of trade are not invariably invalid so long as the restriction is no more than adequate protection to the interests of the party in whose favour it is imposed, and is not injurious to the public interest.

In *McEllistim v. Ballymacelligott Co-op. Agric. etc. Soc.*, [1919] A.C. 548, Birkenhead, L.C., said, at p. 562:—"A contract which is in restraint of trade cannot be enforced unless (a) it is reasonable as between the parties; (b) it is consistent with the interests of the public."

And in the same case Lord Atkinson, said, at p. 574:—"The public is interested in every one of its members having freedom of action to carry on his trade or business, and deal with the property invested in that trade, within the law, as it seems good to him. The deprivation of the subject of that liberty of action in any given instance is, prima facie, an injury to the public interest, and, if it is to be excused or justified, must be excused or justified on the ground that it affords no more than adequate protection to those interests of the private parties concerned which they have a right to have protected."

We have therefore to see in this case if the Pool has established that the restriction is necessary for the reasonable protection of its interests. The witnesses have pointed out that for the delivery in Europe of the immense quantity of grain covered by the Pool agreements, contracts must be made in advance for its transportation over the Great Lakes and across the Atlantic, and for elevator accommodation and so on. All these arrangements are made, and contracts entered into, and sales are made in anticipation of each contract subscriber living up to his contract and delivering the wheat produced by him, an estimate of which the Pool has. If a percentage of the farmers who have signed contracts do not live up to their agreement, the Pool and its agents might find themselves in the position of having made arrangements and entered into contracts

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for the transportation and sale of large quantities of wheat without being able to furnish the grain for the cargoes or to complete the sales; in which case they would have incurred useless expenditure, and perhaps have rendered themselves liable to heavy damages; all of which would have to be borne by the other farmers comprising the Pool. The success of co-operative marketing must necessarily depend upon the selling agency being able to estimate with a fair degree of accuracy the grain for the transportation and sale of which it is its duty to make provision. If one farmer was not obliged by the contract to deliver to the Pool all the wheat he produces, save the exceptions provided in the contract, the other farmers would be in the same position, and the selling agency could never tell how much grain would be forthcoming, or what facilities it must provide. In my opinion it would be unable to carry out the scheme of co-operative marketing unless each contract-signer was under obligation to furnish the grain he had promised to deliver, and that for the full term of the contract.

In the *McEllistirm* case, *supra*, the original rules of the society bound each member thereof to sell all his milk to the society for a period of 3 years, and if he sold to anyone else he was to pay to the society as liquidated damages the sum of 1s. per cow per day for every cow's milk sold contrary to the rule. Subsequently the rule was changed so as to bind the member not to sell his milk elsewhere as long as he remained a member of the society, and he could only cease to be a member when the committee consented thereto. It was held that the new rule was invalid, as it might bind a man for his whole life. A perusal of their Lordships' judgments in my opinion makes it clear that the original 3 year rule was considered valid and binding, as being limited to a term reasonably necessary for the society's protection.

In the present case, considering the preparations that must be made for handling the immense quantity of grain covered by the contracts, the organization necessary for that purpose, the storage facilities to be acquired, and the perfecting of the selling organization in Europe, I am of opinion that the restriction prohibiting the defendant from selling to any other person than the Pool for 5 years was very reasonable, and necessary for the Pool's protection.

It was further argued that, if the restriction as to time was reasonable, it was unreasonable and unnecessary in that the clause compelled the defendant to deliver not only wheat grown

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by him, but also wheat which he might acquire, and that this was not necessary for the Pool's protection. It was pointed out on behalf of the Pool that one of its objects was to get as large a quantity of wheat as possible sold through its agency; that the larger the quantity sold by it, the greater would be its success, and the cost of handling so much less per bushel, which, as the selling agency made no profits, would lessen the amount charged for expenses against the wheat of each member. Further it was pointed out that, if the farmer could acquire grain and sell it outside the Pool, while he was obliged to deliver all the grain grown by him to the Pool, it would make it much more difficult to prove the amount of grain to which the Pool was entitled in case the farmer failed to deliver the grain he had grown.

It is, in my opinion, unnecessary to determine this point, as there is no question here of a failure on part of the defendant to deliver wheat acquired by him, and even if such a provision was not reasonably necessary for the Pool's protection, it would not invalidate the covenant to deliver the grain grown by the defendant, for that part is severable from his covenant to deliver the grain he might acquire (*Underwood & Son v. Barker*, [1899] 1 Ch. 300). I incline however to the opinion that, in view of the objects sought to be attained by the formation of the Pool, and the necessity for its success that as large a quantity of wheat as possible should be marketed through its agency, it is not unreasonable to require a Pool subscriber to market all his wheat whether grown or acquired through the Pool. As pointed out in *Dubowski & Sons v. Goldstein*, [1896] 1 Q.B. 478, the contract must be construed with reference to the business of the plaintiffs which it is the object of the parties to protect.

Then, is the restriction consistent with the interests of the public? In *McEllistram v. Ballymacelligott Co-op. Agric. etc. Soc.*, [1919] A.C. at pp. 571-2, Lord Finlay said, quoting James, V.-C., in *Leather Cloth Co. v. Lonsont* (1869), L.R. 9 Eq. 345, at p. 354:—"Public policy requires that every man shall be at liberty to work for himself, and shall not be at liberty to deprive himself or the State of his labour, skill, or talent, by any contract that he enters into." This is equally applicable to the right to sell his goods."

While it is in the public interest that a man should be allowed to sell his goods where he pleases, it is at least equally in the public interest that a man should not break his contracts. In *Underwood & Son v. Barker*, [1899] 1 Ch. at p.

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305, Lindley, M.R., said:—"If there is one thing more than another which is essential to the trade and commerce of this country it is the inviolability of contracts deliberately entered into."

And in *A.G. Australia v. Adelaide SS. Co.*, [1913] A.C. 781, at p. 795, the Privy Council, *per* Lord Parker, said:—"Their Lordships are not aware of any case in which a restraint though reasonable in the interests of the parties has been held unenforceable because it involved some injury to the public."

It may be that cases may arise in which the injury to the public interest would be so great that a restriction although reasonable as between the parties would be held unenforceable, but as their Lordships in the last mentioned case have pointed out, such a case has not yet appeared. In my opinion the present is not such a case. I am therefore of opinion that the defence that the contract is in restraint of trade fails, and that the defendant is liable for breach of his contract.

The only remaining question is, as to the extent of the defendant's liability. Is the 25c per bus. stipulated for in the contract as liquidated damages the proper measure of his liability? *Prima facie* it is, for he agreed to pay it. It is contended, however, that it is not liquidated damages but a penalty, and that in such cases a plaintiff can recover only his actual loss.

"The essence of liquidated damages is a genuine covenanted pre-estimate of damages" likely to accrue. While "the essence of a penalty is a payment of money stipulated as in terrorem of the offending party" (Lord Dunedin in *Dunlop Pneumatic Tyre Co. v. New Garage & Motor Co.*, [1915] A.C. 79, at p. 86). Whether the sum stipulated to be paid is a penalty or liquidated damages, is to be decided upon the terms of the contract, the circumstances under which it was entered into, nature of the undertaking, and the loss which at the time the contract was made the parties might have considered as flowing from its breach. Parties to a contract may agree that if one party breaks his contract he will pay a fixed sum to the other as damages therefor.

In *Clydebank Eng. & Shipbldg. Co. v. Castaneda*, [1905] A.C. 6, at p. 11, Halsbury, L.C., said:—"The very reason why the parties do in fact agree to such a stipulation is that sometimes although undoubtedly there is damage and undoubtedly damages ought to be recovered, the nature of the damage is such that proof of it is extremely complex, difficult, and expensive."

The general principle to be extracted from the authorities

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upon this point I think is, that if the damage likely to accrue from the breach cannot be determined, or if the proof thereof would be very "complex, difficult, and expensive," and if the amount fixed is not so large as to be unconscionable, the amount agreed to should be taken as a genuine pre-estimate of the damage.

In the case before us, the direct loss of the 25c per bus. and the 1% on the price is not very great, but in my opinion the indirect loss might be most material. If any considerable percentage of the members of the Pool refused to deliver their wheat, it would disrupt the whole organization and subject the Pool to loss and damage which cannot be estimated. As I have already pointed out, the Pool officials must make arrangements in advance for the handling and marketing of the entire crop covered by the Pool agreements. If that crop is not delivered, they will have incurred the expense of providing storage, transportation, and marketing facilities far in excess of their actual needs. The loss the Pool would suffer thereby could only be proved with great difficulty, if at all.

On the other point, it does not seem to me that 25c per bushel is an unconscionable amount at which to fix the damage under the circumstances. The case before us, in my opinion, comes within the principles laid down in the decision given in the *Dunlop* case above referred to.

I therefore hold the 25c per bushel stipulated for in the contract to be liquidated damages, and that the defendant is liable for the amount claimed.

would therefore allow the appeal with costs, set aside the judgment below, and enter judgment for the plaintiffs for \$397.50 and costs.

TURGEON, J.A.:—The plaintiff is a co-operative association incorporated by a private Act of the Legislature of Saskatchewan, 1924 (Sask.), c. 66, with power to carry on the business of dealing in grain in all its branches. The principal object, for the present, at least, of the incorporators and of all those who have joined the association and have thereby entered into a contract with it for the handling and marketing of wheat—to which commodity the activities of the association have so far been confined—is to be found set out in the recital to the form of contract which is under consideration in this case. It is there stated that the purpose of each wheat grower who joins the association and signs the contract is, "to co-operate with others concerned in the production of wheat in the Province of Sas-

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katchewan and in the marketing of the same, for the purpose of promoting, fostering and encouraging the business of growing and marketing wheat co-operatively and for eliminating speculation in wheat and for stabilizing the wheat market; for co-operatively and collectively handling the problems of Growers, and for improving in every legitimate way the interests of Growers in the Province of Saskatchewan, and for other pertinent purposes."

During the early part of the year 1924 the association, by means of agents, solicited the signatures of wheat-growers to the contract in question. By the terms of this contract each signatory agreed to consign and deliver to the association all the wheat "produced or acquired by or for him in the Province of Saskatchewan" during a period of 5 years, and, consequently, not to sell or otherwise dispose of any of this wheat to or by means of any other person, but always to act through the agency of the association. (Notwithstanding some contention to which this second clause (numbered 12 in the contract) gives rise, I think, reading the contract as a whole, that this is the effect which must be given to it. It clearly is not a seller and buyer agreement but an agency agreement, and if cl. 12 presents any doubt or ambiguity the clear intent of the whole contract should govern (*Livingstone v. Ross*, [1901] A.C. 327)). Exception was made only for wheat to be retained by the grower for his own food, seed and feed, or such wheat as he might, with the permission of the association, dispose of to any other farmer for similar purposes. The contract also set out that the grower was desirous of becoming a member of the association, and contained an application by him for one share of capital stock, for which he agreed to pay the sum of \$1. He also agreed to pay the sum of \$2 towards defraying the expenses of organization of the association, including the organization of its committee appointed to carry on "field service and educational work and other proper activities of the Association."

Provision was made in the agreement for damages to be paid by the grower in case of a breach of his contract, in the following clause which gave rise to much of the contention on this appeal:—"25. Inasmuch as the remedy at law would be inadequate and inasmuch as it is now and ever will be impracticable and extremely difficult to determine the actual damage resulting to the Association, should the Grower fail so to deliver all of his wheat, the Grower hereby agrees to pay to the Association for all wheat delivered, sold, consigned or mark-

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eted by or for him or withheld other than in accordance with the terms hereof, the sum of Twenty-five Cents (25c) per bushel as liquidated damages for the breach of this Contract, all parties agreeing that this Contract is one of a series dependent for its true value upon the adherence of each and all of the contracting parties to each and all of the said Contracts."

The association undertook on its part to act as the agent of the grower for the handling and marketing of his wheat "according to its best skill and ability with a view to obtaining the best possible price therefor," it being provided, however, that the Association would dispose of the wheat in such manner as it might "determine to be to the best advantage of all the growers who have executed this agreement or an agreement similar in terms." All wheat of the same grade belonging to the growers and entering into the contract was to be pooled as to price, and each grower was to receive his proportionate share of the monies realized from the sale of this wheat by the association. The association was empowered by the grower to deduct from his return, in addition to the amount necessary to pay handling expenses, a sum not exceeding 1% of the gross selling price of the wheat, to form a reserve to be used for the purposes of the association, and a further sum, not to exceed 2c per bus. to be invested by the association in the construction or acquisition of grain-handling facilities.

The contract as signed was tentative in character, depending for its force and validity upon the adhesion to the association, before a certain date, of the owners or occupiers of at least 50% of the wheat acreage of the Province, to be determined by estimate of the department of agriculture of Saskatchewan. The date for the attainment of this condition and upon which, in case of failure, the contracts of those who had signed were to become void, was set in the contract itself at September 12, 1923, but this provision was changed by a supplemental contract, which provided instead that the date was to be fixed by a resolution of the directors of the association. It was also provided that the association would make known the fulfilment or the non-fulfilment of this condition, as the case might be, by publishing the information in all the daily newspapers in the Province as soon as practicable after the date set. This condition was made applicable as well to the grower's application for membership in the association, it being provided that the association would allot the share applied for only if the necessary number of growers signed the contract in time. Otherwise it was provided that the \$1 paid by the grower at the time

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of signing the contract would be dealt with as a contribution to the association towards the expenses of organization and field service.

The defendant signed both the principal contract and the supplement on June 20, 1924. The date for the fulfilment of the condition regarding 50% acreage was subsequently fixed by the directors of the association at June 26, 1924. On that same date a certificate was issued by the chairman of the board of directors, certifying that this necessary condition had been fulfilled, and public notice of this fact was thereupon given in the daily newspapers as provided in the agreement. On September 8, 1924, the association, in pursuance of another clause in the contract, gave public notice that it would commence operations on that date.

The defendant's contract contained, as I have said, an application for membership in the association and for 1 share of its capital stock. At the meeting of directors held on June 26, 1924, it was resolved "that the company do now proceed to make allotment of stock." At that time there were 46,509 contract-signers, all of necessity applicants for membership according to the terms of the contract. There is nothing to show what steps, if any, were taken by the directors to make an actual allotment, i.e., to appropriate to each applicant, and particularly to the defendant, a share of the capital stock. I would gather from the evidence that nothing further was done in this regard than to file all the contracts received from growers, with a list of the names, and then to consider each one to be a shareholder for the purposes of the association, by writing to him as a shareholder, sending him ballots for voting, etc. The Act of incorporation of the association provided (s. 4 (pp)) that the government and control of the association should be confided to delegates to be elected by the shareholders, and that these delegates, and not the shareholders themselves, should attend and have power to vote at the meetings of the association. Pursuant to this provision, the first election of delegates was held on July 14, 1924, and the balloting was conducted by mail. The defendant received a ballot from the association and voted for one of the candidates his vote being duly recorded.

Later on in the season, when the defendant's wheat was ready for market, he did not deliver any of it to the association as provided in the contract, but sold it to another firm. The amount of wheat thus disposed of by him was 1590 bus. The plaintiffs, relying on the above-cited clause in the contract regarding dam-

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ages, in case of breach by the grower, claim against him the sum of \$397.50, being damages at the rate of 25c per bus.

Upon the trial of the action before Embury, J., [1926] 1 D.L.R. 770, the plaintiffs' right to recover was disputed on several different grounds, all of which were considered by the trial Judge. He held that the plaintiffs' action must fail on the ground that there had never been a completed agreement between the parties. He expressed the opinion that the form of contract as signed by the defendant was nothing more than an offer on his part to enter into contractual relations with the company, as well as an application for shares of its capital stock; that to complete the contract and to make the defendant a shareholder, the acceptance of his offer and of his application for membership should have been communicated to him; and that, no such communication having been made to the defendant, he was released from liability. He held further, that the provision in the contract for the payment of damages by the defendant in case of breach at the rate of 25c per bus., was a provision for a penalty and not for liquidated damages, its real object being, in his opinion, to compel delivery of the wheat, and not to fix the damages which would arise from non-delivery. He held that if the plaintiffs were entitled to any damages, such damages were merely nominal. On the other grounds of appeal he either held in favour of the plaintiffs or expressed no decided opinion. He dismissed the plaintiffs' action with costs.

The first question to be considered is, whether there was a completed agreement between the parties. With great respect I think that there was such an agreement, and that the trial Judge was in error on this point. The facts as set out above show, in my opinion, that the contract was binding upon the defendant, and that he did become a shareholder in the association. This appears to me to follow clearly from the terms of the document signed by the defendant, and by the subsequent conduct of both parties. The document in this case is not on its face a one-sided offer, made tentatively, as for instance was obviously the case in *Meynell v. Surtees* (1885), 25 L.J. Ch. 257, relied upon, among other authorities, by defendant's counsel. The contract under consideration contained in its very terms a clear intimation that it was to become binding upon the defendant in the event of the plaintiffs' succeeding in procuring a certain number of other similar contracts to be signed, before a certain date. The occurrence of this event was made known to the defendant in the very manner in which he agreed

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that it should be made known to himself and to all other wheat-growers signing a similar contract, i.e., by publication in the daily newspapers, which publication took place on June 26, 1924. It was part of his contract, or, as it may otherwise be stated, a condition of the completion of his contract, that he should become a shareholder in the association, and the association dealt with him as a shareholder by sending him a ballot to vote in the election of delegates, and he acted as a shareholder by accepting the situation and casting his vote. I cannot see how it can be argued after these occurrences that his contract was nothing more than an offer on his part, and that communication of the acceptance of this offer by the plaintiff was never made to him. I have already said enough, perhaps, to show that the same reasons apply to make him to all intents and purposes a shareholder in the association. Even if no formal allotment of a share has as yet been made to him upon the register of the association, it is clear, under the circumstances, that both the association and himself have acted in such a manner as to preclude each of them from disputing the fact of the defendant's membership against the other. "The communication of the acceptance" (of an application for shares) "need not necessarily be in writing, but it must be communicated in some way, whether by writing or verbally, or by conduct" (Palmer's Company Law, 12th ed., p. 112, citing *Gunn's Case* (1867), L.R. 3 Ch. 40).

Surely each of the parties here is precluded from raising the question: the company by its conduct in sending the defendant a shareholder's ballot and in accepting it from him as a record of his vote, and the defendant by his action in accepting and using the ballot, and thus assuming to act as a shareholder of the company. In these circumstances, the act of making a formal appropriation of one share to the defendant and of entering his name upon the association's register, (if these things have not yet been done) were formalities which either party may require to be done at any time, or may consider as having been done. I am therefore of opinion that the judgment of the trial Judge cannot be sustained upon the ground upon which he bases it.

But this ground failing, the defendant seeks to have the plaintiffs' action dismissed upon the other grounds advanced by him at the trial. He contends, in the first place, that the plaintiff association, at the time that this cause of action arose, was carrying on the business of a "primary grain dealer" within

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the provisions of the Canada Grain Act of that date, and that it was carrying on such business without a licence and therefore illegally. The nature of the business then being carried on by the association was that contemplated in the contract entered into with it by the defendant: the business of handling and marketing the wheat of its members upon the conditions which I have already set out in full. The Canada Grain Act then in force defined a primary grain dealer as quoted *ante* p. 813.

Further on the Act made the following provision under 1919 (Can.), c. 40, s. 20:—"219A. (1) No person, firm or corporation shall carry on the business of a Primary Grain Dealer without first having obtained a license so to do from the Board and entered into a bond, with sufficient sureties, for such amount and in such form as is approved by the Board."

These two provisions relating to primary grain dealers were incorporated into the Canada Grain Act of 1912, then in force, by an amendment, being 1919 (Can.), c. 40. It will be noted that its provisions are made applicable only to those dealers in grain whose operations were not covered by some of the other licensing provisions of the Act. But at that time the Act contained, and it continued to contain in ss. 210 and 211, a provision for the licensing and bonding of commission merchants, and s. 215 provided as follows:—"No person shall engage in the business of selling grain on commission, or receive or solicit consignments of grain for sale on commission, in the Western Inspection Division, without first obtaining such annual license from the Board."

From the nature of the business carried on by the association, it seems to me that their operations were such as to require, if anything, the licence of a commission merchant rather than that of a primary grain dealer. I think that this appears from an examination of the contract itself, and of the respective provisions of the Act pertaining to the two classes of licensees together with the forms of contract provided in the Act to be used by each; these forms, while not conclusive being at least informative, in case of doubt, of the true intention of the Act. By cls. 20 and 21 of the contract the plaintiffs expressly take power to sell the wheat themselves, or through any agency. At present they sell through the agency of the Canadian Wheat Producers, Ltd. But no objection has been taken to this action on the ground of the association having operated illegally as a commission merchant. If we were called upon to examine the provisions of the Act regarding the licensing of commission

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merchants, we should have to do so in the light of the views expressed by the majority of the members of the Supreme Court of Canada in *The King v. Eastern Term. Elev. Co.*, [1925] 3 D.L.R. 1, which seem to support those of the Court of Appeal of Manitoba in *Rex v. Manitoba Grain Co.* (1922), 66 D.L.R. 406, 37 Can. C.C. 346, 32 Man. L.R. 52, where those provisions were held to be *ultra vires* the Parliament of Canada.

We are not called upon here to decide whether or not Parliament has power to control and regulate the operations of the plaintiff association, and of similar associations, by means of a licence or otherwise, but I am of opinion that the Canada Grain Act in force in 1924 did not contain any valid licensing provision applicable to the association, and with which the association would have had to comply in order to make its operations legal.

The defendant alleges in the next place, that the contract is in restraint of trade and therefore void and unenforceable.

By the terms of the contract the defendant binds himself, for a term of five years, to market through the plaintiff association all the wheat which he may produce or acquire, except such wheat as he may require to keep for his own food, seed and feed, or which with the consent of the association he may dispose of to another farmer for similar purposes. Save in the case of these exceptions, the defendant is bound, under a literal construction of the contract, to place all his wheat on the market for sale, and to do so through the agency of the association. This agreement is said to be unduly restrictive, and therefore illegal and void for the ordinary reasons recognized by the law of contract as laid down in the decisions of the Courts, a great number of which were cited to us, and also by virtue of s. 498 of the Cr. Code, which prohibits conspiracies, combines and agreements designed to restrain or injure trade, or to enhance unreasonably the price of commodities, or to prevent or lessen competition in their production or sale.

I think it will tend to a clearer exposition of the subject if I first direct my attention to the rules of law which must govern all contracts, whether or not they come within the prohibition of the statute, leaving the provisions of the Code to be considered later, if it should be necessary to pursue the inquiry into that field.

In considering questions of this kind, two fundamental principles of public policy must be taken into account; (1) freedom of trade, and (2) freedom of contract. It is the duty of the

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Sask. Court to adjust whatever conflict may appear to exist between these two principles, under the circumstances, and to determine whether the restrictive contract under review can be supported without undue encroachment upon the freedom of trade. I think I cannot do better, in order to establish the character of the inquiry, than to cite the following extracts from the judgments delivered in the House of Lords in *Morris v. Saxelby*, [1916] 1 A.C. 688, and by the Judicial Committee of the Privy Council in *A.-G. Australia v. Adelaide SS. Co.*, [1913] A.C. 781.

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In *Morris v. Saxelby*, at p. 699, Lord Atkinson says:—"It is quite true, as the Master of the Rolls points out, that, as things now are, two principles or views of public policy come into conflict in such cases as this, namely, freedom of trade and freedom of contract. While the community is vitally interested in trade being free, it is also vitally interested in people being free to contract and being held to their contracts."

And Lord Shaw says, at p. 716:—"The delicacy of the operation of law in settling the bounds of either freedom has been long familiar. In these cases, as I have pointed out, there are two freedoms to be considered—one the freedom of trade and the other the freedom of contract: and that I will now again venture to add that it is a mistake to think that public interest is only concerned with one; it is concerned with both."

In *A.-G. Australia v. Adelaide SS. Co.*, the judgment (*per* Lord Parker) says, at p. 797:—"Further, it must be remembered that the question whether a restraint of trade is reasonable either in the interest of the parties or in the interest of the public is a question for the Court, to be determined after construing the contract and considering the circumstances existing when it was made. It is really a question of public policy and not a question of fact upon which evidence of the actual or probable consequences, if the contract be carried into effect, is admissible."

A restraint of trade is *prima facie* opposed to public policy and therefore void. But the covenantees, (the plaintiffs in this case), may show that there are special circumstances which justify it, in other words, that the restraint imposed upon the covenantor does not exceed what is necessary to protect their interest under the contract. In that case the onus is upon them to prove the special circumstances. It is then for the Court to determine, as a question of law, whether the circumstances set up justify the restraint as being reasonable between the parties.

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If they do not, the restraint is bad and cannot be enforced, because public policy will not allow a man to restrain his trade activities more than is reasonably necessary to protect the interests of the other party under the contract into which they have both entered. But although the restraint may appear to be reasonable as between the parties and therefore justifiable, the covenantor, (the defendant here), may still show that it is injurious to the public, and void for that reason, but in that case the onus is upon him. In order to free himself from a contract which, although restricting in character, appears to be reasonable and therefore valid, by invoking the public interest, the defendant must show that the restraint imposed upon him is "of a kind and type which, if general, would be injurious to society at large" (*per* Lord Shaw in *Morris v. Saxelby*, [1916] 1 A.C., at 716; *Mason v. Provident Cloth. & Supply Co.*, [1913] A.C. 724).

The two cases to which I have just referred deal with contracts of employment containing restraints entered into by servants, whereby they agree not to accept employment of a similar kind for a period of time, and within a certain area, after the determination of their contract with the employer. Some of the other cases discussed upon the argument, such for instance as *Nordenfelt v. Maxim Nordenfelt Guns etc. Co.*, [1894] A.C. 535, deal with restrictive covenants of a similar character entered into by the vendor upon the sale of a business with the goodwill. The principles governing the subject of restraint of trade appear to have been laid down almost exclusively in cases dealing with one or the other of these two classes of contracts, where the restrictive covenant was something collateral to the main agreement between the parties; that main agreement being the sale of a business for a certain price in the one case, or a hiring to do particular work for a specified remuneration in the other. In the case at bar we have something different. The defendant does not ask to be relieved from a certain obligation which he assumed apart from or collaterally with the contract itself, but he seeks to avoid the whole contract as being in its terms an agreement in restraint of trade and therefore wholly void. This difference gives rise to difficulties in applying the rules which govern, and which must be gathered from the two classes of decisions to which I have referred. Nevertheless, with the exercise of care the application can be made, and of course it must be made as it has always been made by the Courts in England in cases more nearly

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resembling the case before us (*Society of Gunmakers v. Fell* (1742), Willes 384, 125 E.R. 1227; *Evans v. Heathcote*, [1918] 1 K.B. 418; *Collins v. Locke* (1879), 4 App. Cas. 674; *A.-G. Australia v. Adelaide SS. Co.*, *supra*; *McEllistram v. Ballymacelligott Co-op. Agric. etc. Soc.*, [1919] A.C. 548).

It would appear to follow from the foregoing that our first concern in the case at bar is, to ascertain whether the contract entered into by the parties is in itself a contract in restraint of trade. If it is not, there is nothing more to be said and the defence fails. If it is such a contract, it is bad and unenforceable unless the Court determines as a question of law that under all the circumstances it is reasonable between the parties, and further, (in view of the nature of the defence raised) that it is not injurious to the public.

This first question, however, is not free from difficulty. The rule is, as I have shown, that all contracts in restraint of trade are *prima facie* void. But obviously there are a number of contracts of necessary daily occurrence which by their nature impose a restraint on the activities of the covenantor; thus, all contracts of personal service, all contracts of exclusive agency, etc. It seems hard to imagine that any rule exists to make such contracts *prima facie* bad. However, I can find no definite test to apply to the solution of this general question, and it will probably suffice for the purposes of this case if I treat the question as if it were, whether, under all the circumstances, this contract, with its undoubted restrictions upon the defendant's right to dispose of his wheat for 5 years, is a reasonable one between the parties when all its terms are considered.

The circumstances of the case are very exceptional. It is unlike the case of the ordinary contract into which two parties enter because each sees some advantage to himself to be derived from the relationship to be established between them. It is, of course, true that we have two distinct legal persons as parties to this contract, the association and the defendant. But the Association by this contract does not contemplate the making of any profit for itself, except the 2c per bus. and 1% of the selling price which it receives and which is ear-marked for certain purposes; or even for distribution to its members, as in the case of most other co-operative enterprises. The defendant in signing this contract expresses his desire and his consent to act with other wheat-growers for the attainment of certain objects through the agency of the association which they are all to join. I have already set out in full what these objects

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are. I think there can be no doubt that the particular object of the signers, including the defendant, was to secure a better price for their wheat by eliminating speculation, and thereby stabilizing prices. They were to do this by co-operation, each assuming certain obligations in order that he himself and all his associates might benefit in the result. These obligations have already been mentioned: each member was (1) to market all his wheat, (with the exceptions above mentioned), whether produced by himself or acquired by him from somebody else, and (2) to market it all through the agency of the association. And these obligations were assumed for a 5 year period.

The first obligation which the defendant assumed was, that he would market all his wheat: that is, that he would keep only such wheat for his own use, etc., as the contract provided, and that the rest would be put on the market for sale. It is said that this covenant in itself is too restrictive: the defendant could not become a grain dealer; he could not become a miller; he could not do anything else with his grain than to place it on the market for sale. I cannot see the force of this objection. It must be remembered that the defendant signed this contract as a grower of wheat. He is described as a "grower" all through the contract. He states in the contract that he desires to help solve the problems of growers and to improve the condition of growers in Saskatchewan. None but growers can sign this contract or become members of the association. Wheat-growing is by far the most important industry in this Province, and the grower produces primarily for sale, just as the manufacturer produces primarily for sale although he may keep some of his products for his own use. The defendant signed this contract as a member of the class whom the association is intended to serve. Even if this agreement must be construed to mean that the defendant must remain a seller of wheat for 5 years, unless he ceases to be a grower before the expiration of that time, I am of opinion that, having regard to the objects of the association, or, to speak more accurately, to the objects which the contract was intended to attain, this covenant was a reasonable one. Even if the covenant means that the defendant has agreed not to become a miller or a grain dealer for 5 years, but to remain a seller so long as he continued during that period to produce or to acquire grain in the province, I do not think it goes too far, having regard to all the circumstances of the case.

But it is objected that the defendant has covenanted, not

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only to sell all the grain which he may produce, but also to sell all grain which he may acquire, and much stress was laid during the argument on the use and purpose of the word "acquire." We cannot ignore the fact that many people in this Province are interested in wheat-growing land without being themselves actual growers of wheat. This applies, for instance, to vendors and lessors of land under crop payment agreements. The contract provides that such persons may be considered as growers, and may enter into the agreement and join the association for the purpose of marketing their wheat. But they do not grow their wheat; they acquire it from their purchasers or lessees, as the case may be. I think we must assume from the whole of the agreement that the word "acquire" was brought into use mainly in order to cover their case, the word "produced" being inapplicable to them. It is argued, however, that this word is broad enough to reach beyond the wheat which comes into the possession of this class of people, and to apply to all wheat, even the property of a grower of which he may acquire the ownership otherwise than by his own production. Even if this broad and much more restraining sense be given to the word "acquire," I do not think that the defendant in assuming the obligation can be said to have assumed an undue restraint of trade. Although he has entered into his contract as a grower, there is no compulsion upon him to grow or to acquire any wheat at all during the term of the contract. He stipulates only as to what he will do with the wheat which he may produce or of which he may become the owner. On the other hand, however, and I think this observation is important for the general purposes of the case and that it may as well be made here, there is no restriction whatever placed upon the defendant's output as a wheat-grower. On the contrary, the whole spirit of the contract is to encourage him to produce the greatest quantity of wheat possible, and, in the language of the cases, the growing of wheat for commerce is his "trade." The intent of the contract, if we give it its strictest possible construction, is, that so long as he deals in wheat during the 5 year period it shall be as a seller through the pool. This means that he will not during the period engage in business outside the pool as a grain-dealer, a miller, etc. The purpose of the contract being to secure and encourage co-operative marketing in order that certain objects may be attained, how can a covenant by the defendant not to abandon the co-operation which he himself and his associates are seeking to establish, be said, under the circumstances, to be unduly restrictive? I think

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the covenant is in harmony with the main purpose of the contract, and therefore reasonable (*Ptg. & Numerical Registering Co. v. Sampson* (1875), L.R. 19 Eq. 462).

I have already said enough, I think, to indicate what my view is on the second feature of the defendant's agreement, that is, his covenant to do all his marketing through the association. It is a contract of exclusive agency for a limited period. In my opinion this covenant is a necessary part of the whole plan of co-operation which the defendant and his associates had in mind when the agreement was signed. Without it they could hardly hope to attain their object, and the activities of the association would probably become too hazardous to be undertaken. Under the circumstances, I think it is a reasonable covenant.

When the contract is considered from the narrower point of view of an agreement between the parties who have signed it, that is, the association and the defendant, I think the same results follow. The defendant constitutes the plaintiffs his agents for the handling and the marketing of his wheat. They agree to take steps "according to their best skill and ability to obtain the best possible price therefor," it being understood between the parties, however, that the plaintiffs would dispose of the defendant's wheat — and of the wheat of all the members of the association — in such manner as they might determine to be to the best advantage of all. The defendant therefore had a double object in mind in entering into the contract: to obtain better prices for himself, and also to improve the condition of the wheat-growing class by obtaining better prices for them all, and he relied upon the plaintiffs to accomplish this object for him and for his associates. The desired advantages were to be secured by the method of co-operative selling on the largest possible scale, with a pooling of prices, these methods to be pursued continuously for 5 years, and to be carried on on such a scale as to eliminate or greatly lessen harmful speculation and to have a stabilizing effect upon world prices, the plaintiffs being obliged by the contract to invest part of their earnings in the construction and acquisition of grain-handling facilities, and to place the remainder in a reserve fund. Having regard, then, to the responsibility placed upon the plaintiffs, and the great advantages which they were expected to procure for the defendant, and for those in whom he took an interest, I think that the covenants he entered into on his part in order to enable them to accomplish their task,

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are reasonable, and not unduly restrictive. Anything else might well have been insufficient, and consequently unsafe.

But although the contract is reasonable in the interests of the parties, is it nevertheless invalid as being injurious to the public? This additional test must be applied in view of the position of the case before us. In applying it we must remember that the onus of establishing the invalidity upon this ground is upon the defendant, and that, the contract being otherwise reasonable, this onus is no light one. This is laid down by their Lordships of the Privy Council in *A.-G. Australia v. Adelaide SS. Co.*, [1913] A.C. 781. In this case their Lordships, at p. 795, go so far as to say:—"Their Lordships are not aware of any case in which a restraint though reasonable in the interests of the parties has been held unenforceable because it involved some injury to the public."

However, as was pointed out by Lord Birkenhead in the *McEllistrim* case, *supra*, the double test still exists notwithstanding this dictum in the earlier case, and must be applied if the defendant attacks the contract upon this ground.

I have reached the conclusion that the contract in question is not inconsistent with the interests of the public, and that it survives this second test as well as the first. In dealing with a question of this kind in a Province of Canada, we must take into consideration, not only the rules of the common law as expounded in the English cases, but also the penal provisions of s. 498 of our Cr. Code. As I have already set out fully the aims of the parties to this contract, I think it will conduce to brevity if I proceed immediately to discuss the cases which seem to have some analogy to the case at bar, and in which the contract in dispute was either upheld or set aside, and in some of which at least the questions of public policy and that of reasonableness of contract between the parties were both discussed. This will enable me to distinguish, where necessary, as I go along, between the facts of this case and those involved in the others.

First we have the case of *Soc. Gunmakers v. Fell*, Willes 384, which was tried in the Court of Common Pleas in 1742, where a by-law of the Gunmakers' Society imposing certain restrictions upon its members was held to be invalid, as being in restraint of trade. This by-law provided that no member of the society could (1) sell any gun-barrel of his manufacture to any dealer in guns in London or within 4 miles of London, who was not himself a member of the trade, or (2) place his stamp or mark upon the gun-barrels of any such outside dealer. It is ap-

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parent from the reading of this judgment that the Court was impressed with the fact that these two prohibitions imposed a great hardship upon the defendant, by restraining him in his business as a manufacturer and seller of guns. It limited his market to those of his associates who might choose to buy from him, there being nothing before the Court to show that any of them were obliged to buy from him in particular. From all the evidence before the Court there was nothing to show that all his products might not remain without a purchaser. And the Judges tried the case only on what was before the Court. Willes, L.C.J., who delivered the judgment of the Court, said (p. 388):—"It is very probable that if other parts of the charter and other bye-laws of the corporation were set forth, it might appear to be a good bye-law: but we can take notice of nothing but what is set forth in the pleadings."

In *Evans v. Heathcote*, [1918] 1 K.B. 418, the plaintiffs were manufacturers of cased tubes used in the construction of bedsteads. They and several other manufacturers of these same articles formed an association which was named the Case Tube Association. This association had for its object the regulation of prices, and the taking of whatever action might appear advisable from time to time to protect the interests of its members. Each member was restricted in his output of cased tubes to a fixed percentage of the total output of all the members. The excess profits made by all members whose turnover during any month was greater than their authorized percentage, were pooled in a common fund, and those members whose turnover was less than their authorized percentage were entitled to certain payments out of that fund. On June 24, 1913, the plaintiffs made a contract with 5 firms of bedstead manufacturers to which the association was also a party. By the terms of this contract the plaintiffs' percentage of output for pool purposes was fixed by the association at 6.81 of the total output. The plaintiffs thereupon agreed not to sell any cased tubes to any person other than the 5 bedstead manufacturers. These manufacturers did not agree in return to buy any cased tubes from the plaintiffs, but they undertook merely not to purchase any such tubes from any persons other than the members of the association. This agreement was to bind the parties for an indefinite time, that is, so long as the association and another society, called the Bedstead Manufacturers' Federation, continued to control prices.

In the litigation which followed it was not contended that the contract and the rules of the association were inconsistent

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with the interests of the public, and that question was not dealt with in the judgments delivered. It was held, however, that the contract did impose an unreasonable restraint of trade upon the plaintiffs. Bankes, L.J., after referring to the plaintiffs' agreement not to sell to any but the 5 manufacturers, proceeds to say, at p. 430:—"There is no corresponding obligation on the part of the manufacturers to buy from the plaintiffs, but only an obligation to buy from members of the Cased Tube Association. It appears to me upon the face of these provisions that they provided for a state of things which may result in the shutting down altogether of the plaintiffs' manufacture of cased tubes. Whether the plaintiffs anticipated that the result of the manufacturers purchasing from members of the Cased Tube Association other than themselves would be that they would receive in money from the pool the equivalent of the profit they would have made from the sale of tubes themselves I cannot say. I am not entitled to guess."

The case at bar is distinguishable from both of the foregoing cases by the fact that there is nothing in the contract before us, as I have already shown, which can be said to limit in any way the output and the turnover of the defendant in his trade as a grower and seller of wheat. In fact it is apparent from the objects of the contract that the more wheat he produces for sale, the better. There can be no danger, as I see it, that any quantity of his wheat will be left unsold by reason of anything that may happen under this contract. He restricts himself to the extent that he agrees to market all his wheat through the exclusive agency of the plaintiffs, but it cannot be pretended that the market which he is thereby selecting is any other than the world market, which will absorb all his output.

In *Collins v. Locke*, *supra*, the contract was held to be in restraint of trade, both because it was unreasonable between the parties and detrimental to the public. Certain stevedoring firms in Melbourne, Australia, who were the principal stevedores in that city, entered into an agreement for distributing among themselves the stevedoring of ships in the port. The effect of one of the clauses in the agreement was, that in respect to certain ships entering Melbourne, none of the firms concerned would load them unless the merchants who had chartered them would employ for the loading the particular firm which the associated firms had designated among themselves to load the ship in question. In case of disagreement all parties to the contract were deprived of the work, without compensation, and

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this was held by the Privy Council to be unreasonable as between the parties, as being beyond the bounds of anything which their interests required. On the other hand, the merchants who had chartered the vessels were deprived of employing any one of the firms unless in each case they employed the one selected for them by the parties to the agreement. This was held to be detrimental to the public. I just mention this case because it is in the same class as the others, but beyond that I must say that there does not appear to be any resemblance between the facts involved in it and those of the case before us.

The *McEllistram* case, [1919] A.C. 548, is the one which presents the closest analogy to the case at bar. The plaintiff was a member of a co-operative agricultural and dairy society. The society (pp. 550-1) adopted certain rules. By these rules it was provided, in effect, that (R. 6 (2)) each member should be obliged to sell to the society all milk produced by his cows within the district for which the dairy operated, an area of 86 townships, and not to sell to any other person except with the written consent of the society. He was also (R. 6 (1)) to accept the current price fixed by the managing committee. In case of default he was to pay the society the sum of 1s. per day for every cow's milk sold contrary to the rule. He could not (R. 21) transfer his shares in the society to any other person except with the consent of the committee, and the committee might refuse this consent without assigning any reason for their refusal. Rule 5 did provide, however, that no person carrying on a business similar to that of the society could become or continue a member of the society.

The majority of the members of the House of Lords held that the combined effect of the rules was, to compel the plaintiff during all his life to sell all his milk to the society at their price, unless they chose to allow him to withdraw. Without the consent of the society, the plaintiff could withdraw only by leaving the district and going to live in some other part of the country, or by setting up in the dairy business himself. It is clear from the different judgments rendered, that the by-laws were not held to be invalid merely on account of R. 6, which provided that the plaintiff should sell all his milk to the society at the prices fixed by their committee. In fact, Lord Birkenhead, L.C., said (p. 560) that he was not much impressed by the criticism of this rule standing alone. The case went against the society by reason of the result of all these rules combined, which virtually made the obligation binding upon the plaintiff for life. It was held that the restrictions, extended in this man-

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ner, exceeded what was reasonably necessary to protect the society. Had the restraint been provided to continue for a limited period of years only, the result of the litigation would very likely have been different. Prior to the enactment of the rules complained of, the covenant of the members to sell all their milk to the society was made binding for a period of 3 years only. The restraint thus limited as to time is approved of in several of the judgments, notably by Lord Shaw on p. 589 of the report. In the case at bar the limitation is to run for 5 years only, and this provision alone is sufficient to distinguish this case substantially from the *McEllistrim* case.

I shall now proceed to deal more particularly with the contention that the contract is void as being injurious to the public. Unless the Cr. Code will support this contention, it will be very hard for the defendant to have it prevail—the contract being reasonable between the parties—as was stated by their Lordships of the Privy Council in the quotation I have already given from their judgment in *A.G. Australia v. Adelaide S. Co.*, [1913] A.C. 781.

I can see nothing, either in the objects of the association or in the covenants entered into by the defendant under his contract, which can be said to be detrimental to the legitimate interests of the public. It is true that the members of this association aim to secure better prices for their wheat, but they intend to do this by co-operative marketing, which, they believe, will lessen or eliminate speculation in their commodity, and the consequent fluctuations in its price which have occasioned losses in the past. There is no suggestion that they will endeavour to fix the price of wheat unduly high, or even to fix it at all. It is well recognized that the market for Canadian wheat is the world market, that in fact by far the greater part of it goes to Europe for consumption, and that there it must compete in price and quality with the wheat of other countries. The word, "speculation" is susceptible of various meanings, it being sometimes applied to the most conservative forms of investment. But there can be no doubt from the contract that the sort of speculation which the association desires to abolish is that sort which is condemned universally, and which is well recognized as being dangerous and unprofitable to the public.

Nor do I see how any of the covenants entered into by the defendant can be said to be injurious to the public, even although their effect may be to prevent him from becoming a miller or a grain dealer during the period of his contract. It is of common occurrence for men to make contracts by which they

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bind themselves for a period of years to give their whole time to the one pursuit and to abstain during the term from engaging in other avocations. I do not see how such agreements can, in the absence of special circumstances, be said to be detrimental to the public.

I do not think that s. 498 of the Cr. Code operates to affect the legality of the contract. The principles to be applied in dealing with the legality of this and similar agreements in the light of penal prohibitions are discussed at length in *A.G. of Australia v. Adelaide SS. Co.*, *supra*, and *Weidman v. Shragge*, 2 D.L.R. 734, 20 Can. C.C. 117. Section 498, Cr. Code, prohibits, among other things, combines and agreements the intention of which is *unduly* to limit or prevent the production of any commodity or competition in its sale; or *unreasonably* to enhance its price. I think that I have already said enough to make it apparent that there is not in the contract in question any provision aimed at limiting the production of wheat at all. I can find in it no intent to enhance prices in a manner or to a degree unreasonable in the interests of the public. Nor can I find any intent unduly to lease or unduly to prevent competition in the sale of wheat. Naturally any selling agent, who secures an exclusive selling contract from a principal, puts an end to all competition for his principal's business during the term of the contract. But how can that be said to be an undue prevention of competition? In the course of his cross-examination, McRae, the plaintiffs' general manager, expressed the hope and the belief that some day all the wheat-growers in the Province would be members of the association, in which case it would be the only selling agency left in business, and he said this would be a happy day for the farmers. I can see in this nothing more than an expression of faith in the methods of the association and confidence in its growth, such as might be expected from any earnest believer in and advocate of an enterprise. But even if we go further along this path in dealing with this association, I do not see how it can bring us any nearer to the Cr. Code. If all the wheat-growers of Canada were to unite and to decide to sell all their produce through one selling agency set up or selected by themselves, I do not know by virtue of what principle of law or what provision of the Cr. Code such action could be looked upon as the creation of an illegal monopoly, or what power anyone would have, in the present state of our law, to compel them to desist from their project and to distribute their business among different agencies.

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I think, therefore, that the contract is not in any sense detrimental to the interests of the public, either at common law or under the provisions of the Cr. Code.

The plaintiffs are therefore entitled to judgment against the defendant. It remains now to determine the amount of damages which they can recover. They ask for damages at the rate provided in cl. 25 of the contract, which I have already cited, that is, 25c per bus. for each bushel of wheat sold by the defendant to third parties in breach of his contract. The sum thus arrived at would be \$397.50. But the defendant contends that this payment of 25c per bus. is in reality a penalty and not liquidated damages, that it was put into the contract to compel delivery and not as a genuine pre-estimate of damage, and that the actual damages suffered by the plaintiffs do not exceed \$58.19, made up by the loss to them of the 1% of the gross selling-price of the wheat, for their reserve, and of the 2c per bus. for investment in construction which the contract authorized them to retain.

We have, then, to determine whether cl. 25 really provides a penalty or liquidated damages. I must confess that this question has given me much more concern than any of the others raised on this appeal, and that it is not without some doubt that I have come to the conclusion that the provision is for liquidated damages, and that the plaintiffs are entitled to recover the full amount of their claim. This conclusion, however, seems to me to follow from the authorities which I have examined, among which I may mention particularly the following: —*Lord Elphinstone v. Monkland Iron & Coal Co.* (1886), 11 App. Cas. 332; *Law v. Local Board Redditch*, [1892] 1 Q.B. 127; *Clydebank Eng. & Shipbldg. Co. v. Castaneda*, [1905] A.C. 6; *Diestal v. Stevenson*, [1906] 2 K.B. 345; *Webster v. Bosanquet*, [1912] A.C. 394; and *Dunlop Pneumatic Tyre Co. v. New Garage & Motor Co.*, [1915] A.C. 79.

"The essence of liquidated damages is a genuine covenanted pre-estimate of damage," said Lord Dunedin in the *Dunlop* case, at p. 86. And it is for the Court to determine whether or not this essential character is to be given to the covenant, having regard to all the terms of the contract and the circumstances which existed at the time it was made, and not at the time the breach occurred. Regarding the terms of the contract, it will be noticed that this sum of 25c per bus. is made payable on the occurrence of one kind of breach only, that is, a sale or delivery of wheat by the defendant to a person other than the plaintiffs. It is not payable on the happening of any other

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event of greater or less importance. The general rule applicable to cases of this class (and I do not think I should take time here to discuss the rules applicable to other classes of cases), is laid down by Lord Esher, M.R., in the *Law* case, *supra*; the sum so agreed to be paid is to be considered as liquidated damages and not as a penalty. There are, of course, exceptions to this rule, but the only exception which we are called upon to consider is the following: the presumption in favour of liquidated damages will be overborne if the sum stipulated to be paid is so disproportionate to any damage which might follow from the breach as to be "unconscionable" or "extravagant" or "absurd," according to the different expressions used in the authorities. If it is not of this character, the general rule must apply and the sum to be paid treated as liquidated damages, as the parties themselves have called it.

The rule works both ways, and is quite as binding upon one party as upon the other. Although it is usually the defendant who objects to paying the sum as damages, this is not always the form which the controversy takes before the Courts. Thus in *Diestel v. Stevenson*, *supra*, a plaintiff who had entered into a contract providing for the payment of a lump sum for liquidated damages in case of breach, was compelled to abide by the agreement and to be content with £90 as damages, although it was admitted that his actual damages amounted to £320. The difference between the amount lost and the amount recoverable was great, the one being $3\frac{1}{2}$ times as large as the other, but this difference was not considered sufficient to take the case out of the general rule.

The question then is, whether the sum of 25c per bus., stipulated to be paid by the defendant for the breach complained of, is so disproportionate to any damage which might have been foreseen at the time the contract was made, that it may be said to be absurd, or extravagant, or unconscionable. If it is not, the defendant must pay it as liquidated damages.

In determining this last question it is difficult to draw much assistance from previous cases. I think I cannot do better, in order to explain the difficulty of the inquiry and at the same time to confirm the necessity and expediency of allowing the parties to fix their damages in advance in certain cases, than to quote at length the following passage from the judgment of the Earl of Halsbury, L.C., in the *Clydebank* case, [1905] A.C., at pp. 10-1:—

"It is impossible to lay down any abstract rule as to what it may or it may not be extravagant or unconscionable to insist upon

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without reference to the particular facts and circumstances which are established in the individual case. I suppose it would be possible in the most ordinary case, where people know what is the thing to be done and what is agreed to be paid, to say whether the amount was unconscionable or not. For instance, if you agreed to build a house in a year, and agreed that if you did not build the house for 50 $\text{\pounds}$, you were to pay a million of money as a penalty, the extravagance of that would be at once apparent. Between such an extreme case as I have supposed and other cases, a great deal must depend upon the nature of the transaction—the thing to be done, the loss likely to accrue to the person who is endeavouring to enforce the performance of the contract, and so forth. It is not necessary to enter into a minute disquisition upon that subject, because the thing speaks for itself. But, on the other hand, it is quite certain, and an established principle in both countries (England and Scotland), that the parties may agree beforehand to say, 'Such and such a sum shall be damages if I break my agreement.' The very reason why the parties do in fact agree to such a stipulation is that sometimes, although undoubtedly there is damage and undoubtedly damages ought to be recovered, the nature of the damages is such that proof of it is extremely complex, difficult, and expensive."

In view of the last sentence in this quotation, I think we had best proceed to an examination of the nature of the damage which must have been contemplated when this contract was made in order to determine whether it was such that proof of it would appear complex, difficult, and expensive. If such was its nature, the case was a proper one for the fixing of damages in advance at a lump sum, and the agreement of the parties must be made effective, so long, of course, as the sum so fixed was not out of all reasonable proportion to the damages that might have been anticipated.

Of the numerous authorities which I have examined, the *Dunlop* case, [1915] A.C. 79, appears to me to present the most favourable features for comparison with the case at bar. The facts of this case are as follows:

The plaintiffs were manufacturers on a large scale of motor tires, covers and tubes. They had no patents to protect their manufacture and they depended for success over their competitors upon the efficiency of their business organization. They sold their goods wholesale to different classes of retailers, who in turn sold them to the public. In all cases they required the retailer

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who purchased from them to sign an agreement, which they called "a price maintenance agreement," wherein the retailer agreed not to sell any article at less than the price mentioned in the current price list fixed by the plaintiffs from time to time. The purchase-price of the goods between the plaintiffs and the retailer was the selling-price to the public according to this list, less a discount which the retailer received. This discount constituted the retailer's profit on his sales to the public. The agreement made was the same with all retailers, except that the amount of the discount varied in different cases. The object of the agreement was to prevent the sale to the public of the goods manufactured by the plaintiffs at less than the list price. If any retailer sold an article at less than the list price, he himself would be the immediate loser, the loss coming out of his own discount. Nevertheless each retailer agreed in the "price maintenance agreement" to pay to the plaintiffs, as liquidated damages, the sum of £5 for each and every tire, cover, or tube which he might sell in breach of the agreement, that is, at less than the list-price. The defendants entered into this agreement with the plaintiffs and later sold some of the goods at less than the agreed price. Thereupon the plaintiffs sued them for damages at the rate of £5 for each article sold, according to the terms of the agreement. The defendant contended that the sum provided for was in the nature of a penalty and not liquidated damages. The trial Judge held that the plaintiffs were entitled to recover on the agreement as for liquidated damages, and these damages were ascertained to amount to £250 at the rate of £5 per article sold. The Court of Appeal held that this sum of £5 was a penalty, and they entered judgment for the plaintiffs for the sum of £2 as nominal damages. On appeal to the House of Lords, their Lordships were unanimous in reversing the decision of the Court of Appeal, and they restored the judgment of the trial Judge.

The judgment of the Court of Appeal in this case does not appear to be in the reports, but it would seem from the result of the decision that the Judges of that Court were of the opinion that no actual damage, or nothing more than a negligible amount of damage, could have been foreseen when the contract was made, as being likely to ensue to the plaintiffs through the act of the defendant in selling below the list-price to his own immediate loss. In such a case, of course, no genuine pre-estimate of damage could have placed the sum at £5 per article sold. But in the judgments delivered in the House of Lords it is pointed out that the damage apprehended by the plaintiffs,

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when they made the agreement, as a result of a sale below list-price, was an indirect and not a direct damage. So long as the defendant paid them the purchase-price of the goods called for by the contract, they were not affected directly by anything he might do with the goods. But they were affected indirectly by his action in lowering the price to the public. The consequential injury to their trade due to this undercutting of prices must have been the damage which the plaintiffs had in view when they made the contract. Their Lordships took account of the injury which might result to the plaintiffs' trade if one or more of the retailers who had signed this agreement were to undersell their goods. They took account of the fact that other retailers, seeing the goods undersold and their own profits thereby diminished—as this competition would bring the price down—would be likely to throw up their contract with the plaintiffs and become the agents of a competitor.

Lord Atkinson deals with this feature of the case, at pp. 91-2, as follows:—"In the sense of direct and immediate loss the appellants lose nothing by such a sale. It is the agent or dealer who loses by selling at a price less than that at which he buys, but the appellants have to look at their trade in globo, and to prevent the setting up, in reference to all their goods anywhere and everywhere, a system of injurious undercutting. The object of the appellants in making this agreement, if the substance and reality of the thing and the real nature of the transaction be looked at, would appear to be a single one, namely, to prevent the disorganization of their trading system and the consequent injury to their trade in many directions."

Their Lordships held that this indirect damage was properly the subject of pre-estimated liquidated damages, because of the great difficulty or the impossibility of foreseeing what it would amount to and the difficulty and expense of proving it.

In the case at bar we have the plaintiffs engaged on a large scale in a business the object of which may be said to be to eliminate speculation in wheat, in order thereby to bring to the producer better prices for this commodity and to benefit in this manner all those who sign the contract and join the association as the defendant did. In order to succeed they must be assured of a great number of adherents, and of the handling of a great volume of wheat during the whole 5 year period of the contract. They must necessarily incur great expenditures of money both on capital and current accounts. They have strong competition in their business, as did the plaintiffs in the *Dunlop*

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case, *supra*. They have the same interest that the plaintiffs in that case had to provide in their contracts against any act being committed by the other party which might work to the advantage of their competitors. They would not have embarked upon their enterprise at all unless the defendant and the others who joined the association had assured them of a fair chance of success by joining and by promising continued adherence. It seems to me under these circumstances that the plaintiffs were justified, at the time these contracts were made, to consider as probable, although indirect, damage, the general result which might follow a breach by a grower of his agreement not to sell to their competitors. As the plaintiffs in the *Dunlop* case were entitled to consider as indirect damage the probable effect on one retailer of another retailer's breach in cutting prices—his throwing up of his contract and going over to the service of their competitors—so, I take it, the plaintiffs here were entitled to consider the probable effect on one grower of another grower's breach in selling to a competitor at a higher price than the Pool would likely bring: his throwing up his contract, in turn, to sell to outsiders. And, as in the *Dunlop* case, I think that here the nature of the damages is such that it would be extremely difficult if not impossible to ascertain them and to prove them. It is in such cases that the damages may be fixed in advance, and that the sum so fixed must be held to be final unless it is absurd, extravagant, or unconscionable in comparison with the damage actually suffered. In my opinion nobody can say that the sum of 25c a bus. is any more excessive in this case than was the sum of £5 in the *Dunlop* case for each article sold even at a shilling less than its list-price.

I am of opinion, therefore, that the sum of 25c per bus. fixed in this contract must be considered as liquidated damages, and that the plaintiffs are entitled to recover damages from the defendant at that rate, amounting to \$397.50.

The example of the *McEllistrim* case, *supra*, which I have already discussed, was cited as an instance of a sum of money called liquidated damages being held to be a penalty. In that case the amount fixed in case of breach was 1s. per day per cow for every cow's milk sold contrary to the by-law. This provision, like all the other provisions of these by-laws, was to go on forever unless the committee decided otherwise. It was the indefinite period of all these restrictions, possibly a member's whole lifetime, that caused these by-laws to be rejected as unreasonable. The *McEllistrim* case, in my opinion, is not

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an authority against the plaintiffs on this branch of the case more than on the others.

I would allow the appeal with costs; the plaintiffs to have judgment in the Court below for the amount of their claim and costs.

McKAY, J.A., concurs with LAMONT, J.A.

MARTIN, J.A. (dissenting in part):—The plaintiff is a corporation incorporated by special Act of the Legislature, and its object is to provide a means to enable growers of wheat in Saskatchewan to market their products collectively. In order to effect such purpose, the plaintiff issued a standard form of contract, known as "the growers' contract," for signature by all growers of wheat in the Province who desired to avail themselves of the opportunity of marketing their wheat collectively.

The recitals in the standard agreement set out the objects of the corporation as follows:—

"Whereas, the undersigned Grower desires to co-operate with others concerned in the production of wheat in the Province of Saskatchewan and in the marketing of the same, hereinafter referred to as Growers, for the purpose of promoting, fostering and encouraging the business of growing and marketing wheat co-operatively and for eliminating speculation in wheat and for stabilizing the wheat market; for collectively handling the problems of Growers and for improving in every legitimate way the interests of Growers in the Province of Saskatchewan, and for other pertinent purposes;

"And Whereas, the Association has been formed under 'The Companies Act' of the Province of Saskatchewan [R.S.S. 1920, c. 76] with full power to act as agent, factor, mercantile agent and attorney, in fact, to handle wheat produced and delivered to it by its members, and with such further powers as are set forth in its Memorandum of Association;

"And Whereas, the Grower is desirous of becoming a member of the Association and of entering, together with other Growers, into this contract with the Association:

"And Whereas, this Agreement, although individual in expression, is one of a series either identical or generally similar in terms between the Association and Growers of wheat in the Province of Saskatchewan, and shall constitute one Contract between the several Growers of Wheat in the Province of Saskatchewan signing the same and this Association;

"Now this Agreement Witnesseth that, in consideration of the premises and in consideration of the covenants and agree-

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ments on the part of the Association as hereinafter set forth, and in consideration of the execution of this Agreement, or one similar in terms, by other Growers of wheat in the Province of Saskatchewan, and in consideration of the mutual obligations herein set forth, the Parties hereto hereby agree to and with each other as follows"

The important provisions of the contract for the purposes of this case are as follows:—

"5. The Grower covenants and agrees to consign and deliver to the Association or its order at the time and place designated by the Association all of the wheat and the warehouse or storage receipts, grain tickets, bills of lading and all other documents of or evidencing title thereto covering it produced or acquired by or for him in the Province of Saskatchewan, except registered seed wheat, during the years 1923, 1924, 1925, 1926 and 1927."

"12. The Grower expressly covenants and agrees that he will not (save as herein permitted) sell or otherwise dispose of any of the wheat produced or acquired or owned by him in the Province of Saskatchewan during the life of this Agreement to any person or persons, firm or corporation other than this Association."

"17. The Grower covenants and agrees to, and hereby does irrevocably apply for one (1) share out of the Ordinary Shares in the capital stock of the Association and agrees to pay to the Association the par value thereof, namely, the sum of One Dollar (\$1.00). The Association covenants and agrees to accept the said application and to allot to the Grower one (1) share of stock of the Ordinary Shares in the capital stock of the Association, provided the signatures required by paragraph 1 hereof are obtained within the time therein set out. Should such signatures be not so obtained the Grower agrees that the said sum of \$1.00 shall be contributed to the Association for the purposes set out in paragraph 18 hereof."

"25. Inasmuch as the remedy at law would be inadequate and inasmuch as it is now and ever will be impracticable and extremely difficult to determine the actual damage resulting to the Association, should the Grower fail so to deliver all of his wheat, the Grower hereby agrees to pay to the Association for all wheat delivered, sold, consigned or marketed by or for him or withheld other than in accordance with the terms hereof, the sum of Twenty-five Cents (25c) per bushel as liquidated damages for the breach of this Contract, all parties agreeing that this Contract is one of a series dependent for its true value upon

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the adherence of each and all of the contracting parties to each and all of the said Contracts."

In the standard form of contract it was provided that, unless a sufficient number of contracts had been signed by September 12, A.D. 1923, to equal 50% of the total acreage of wheat in the Province in the said year, the contract would be at an end. This time limit was subsequently extended to a date to be fixed by resolution of the directors, and a supplementary contract containing provisions providing for such extension was sent to each person who had signed the standard form of contract for signature. The date finally fixed by the directors was June 26, 1924, and on that date the chairman of the board of directors issued his certificate that contracts had been secured equal to 50% of the acreage of wheat in the Province of Saskatchewan in the year 1923, according to the estimates of the provincial department of agriculture. This certificate was issued by the chairman of the board of directors pursuant to the provisions of para. 3 of the standard form of contract, as amended by the supplementary agreement. Notice was then given of the fact that 50% of the acreage had been secured, by the publication of notices in the newspapers of the Province. This was also in accordance with the provisions of the contract.

The plaintiff in this action alleges that the defendant entered into the standard form of agreement and the supplementary agreement, and that all the conditions on the part of the plaintiff have been fulfilled to make the contract a binding one between the parties; but that, contrary to the terms of the agreement, the defendant delivered and consigned through the Pioneer Elevator Co., a carload of wheat, containing 1590 bushels, and which wheat was produced or acquired by him in the Province of Saskatchewan in the year 1924. The plaintiff claims the sum of \$397.50, being 25c a bus. on the amount of wheat so sold by the defendant, as liquidated damages under the terms of the contract; or in the alternative the sum of \$397.50 as general damages.

A number of defences are set up:—(1) that the contract was induced by fraud; (2) that the plaintiff has failed to take out a licence as a primary grain dealer under the provisions of s. 219A of the Canada Grain Act; (3) that the contract was in restraint of trade; (4) that the liquidated damages as provided for in the contract are in the nature of a penalty.

Pursuant to the Rules of Court, notice was given to the Minister of Justice for the Dominion of Canada and to the Attor-

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ney-General for the Province, but it has been intimated by both that they do not desire to intervene.

The trial of the action took place before Embury, J., [1926] 1 D.L.R. 770, who delivered judgment holding: (a), that no fraud had been proven; (b) that the plaintiff was a primary grain dealer within the provisions of s. 219A of the Canada Grain Act, but that this section was *ultra vires* of the Parliament of Canada; (c) on the question of restraint of trade he made no finding; (d) he dismissed the action on the ground that there was no completed contract between the parties, and while it was not necessary, in view of this finding, for him to do so, he expressed the opinion that the liquidated damages provided for in the contract were in the nature of a penalty.

From this judgment the plaintiff has appealed, contending that there was a completed and binding contract between the parties, and that the liquidated damages as provided in the contract should be awarded to the plaintiff.

As to the contract, the evidence shows that the defendant was waited upon on June 20, 1924, by one Bristow, an agent of the plaintiff corporation, and that on that day the defendant executed the standard form of contract, and also the supplementary contract.

The question of whether or not there was fraud inducing the contract, does not require consideration; for, while it was alleged as a defence and was dealt with in the Court below, defendant's counsel abandoned this ground on the appeal.

The defence of fraud having been abandoned, I am of the opinion that when the defendant executed the contracts on June 20, 1924, the same became binding upon him, subject only to the fulfilment of the conditions therein expressed as to the obtaining of contracts covering 50% of the total acreage of wheat in the Province in the year 1923, and subject to the fulfilment on the part of the plaintiff corporation of any steps to be taken by it, as provided by the terms of the contract, as to communicating to the contract-holders the fact that sufficient acreage had been obtained and that the corporation proposed commencing business. The evidence clearly establishes that the necessary acreage was procured, and in accordance with the terms of the contract the plaintiff gave notice thereof in the newspapers of the Province, and also gave notice at a later date that business was to commence. Moreover, the defendant himself was notified as a shareholder in the month of July, 1924, for a printed form of ballot was sent him for the purpose of

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electing delegates, whose duty it would be to elect the officers of the corporation. The defendant exercised his right as a member and shareholder, inserted the name of the person for whom he desired to vote, signed his ballot, and returned the same to the plaintiff. The ballot form itself refers to the defendant as a shareholder, and I do not see how he can now be heard to say that there was no completed agreement.

Defendant's counsel, however, draw attention to para. 17 of the contract, which is set out fully above, and in which the plaintiff covenants and agrees to accept the application of the defendant for 1 share of capital stock and to allot the same to the defendant, and his contention is, that no stock was allotted to the defendant, and that if stock was allotted no notice of allotment was given.

The evidence shows that, by resolution of the directors on June 26, 1924, it was decided to allot stock to all those entitled thereto, inasmuch as the required acreage had been procured. The resolution of allotment covered all the contracts that had been procured to that date, and the evidence establishes the fact that the defendant's contract was at that time in the hands of the plaintiff corporation. There does not appear to have been any formal notice of allotment given to the defendant. He was however as above stated, sent a ballot for the election of delegates, and in that ballot he is referred to as a shareholder. He signed the ballot and voted for the delegate. The sending of the ballot to him and its receipt by him was, in my opinion, a sufficient notice that stock had been allotted to the defendant, and by his conduct he, in reality, adopted the status of shareholder.

In Palmer's Company Law, 12th ed., p. 113, it is stated that:—"If notice of allotment is disputed, the onus is on the company to prove the notice; but this onus it may discharge by proving acts on the part of the alleged member going to show that he was aware of the allotment and assented to it (*Crawley's case* (1869), 4 Ch. App. 322); for formal notice is not necessary."

Notice of allotment need not be express—if there is a response on the part of the company in writing, in words or conduct, sufficient to show the applicant that his application for shares is accepted, it appears all that is necessary; even conduct on the part of the applicant which shows that he is aware of the allotment, is sufficient (*Mitchell's Canada Commercial Corporations*, 1916, p. 496).

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I am of the opinion, therefore, that the plaintiff did all that it was required to do under the terms of the agreement; that the contract became complete between the parties when the conditions therein stated were fulfilled, and that the defendant is bound thereby.

This conclusion renders it necessary to consider the damages to which the plaintiff is entitled, for the evidence shows beyond doubt that the defendant delivered to the Pioneer Grain Co. in violation of the terms of his contract 150 bus. of wheat; in fact he admits that he sold more than this amount. Before considering the question of damages, however, I desire to dispose of the various defences raised.

Counsel for the defendant contend that the plaintiff is a "primary grain dealer" within the meaning of s. 219A of the Canada Grain Act, and that it required a licence from the board of grain commissioners, which the evidence shows it had not. By 1919 (Can.), c. 40, the Canada Grain Act was amended by inserting therein a definition of "primary grain dealer." This is quoted *ante* p. 813.

Section 219A provided, that no person shall carry on the business of a primary grain dealer without first having obtained a licence so to do from the board of grain commissioners, and there is a further provision that every primary grain dealer shall make his contracts in writing in duplicate in form "H" in the schedule to the Act.

In order to determine whether or not the definition of primary grain dealer applies to the plaintiff corporation, it is necessary to look at the provisions of the Canada Grain Act with reference to the different classes of persons and corporations requiring licences from the board of grain commissioners.

Section 119(A), of 1912 (Can.), c. 27, provides that the board shall, "require all track-buyers and owners and operators of elevators, warehouses and mills, and all grain commission merchants to take out annual licenses." And ss. 210 to 220, inclusive, contain special provisions as to track-buyers and commission merchants, s. 215 definitely stating that no person shall engage in the business of selling grain on commission without first obtaining an annual licence from the board.

In order to apply the term "primary grain dealer" to any person in accordance with the definition, two things are necessary: (1) he must contract with the producer to purchase or handle grain for commerce, and (2) he must deal in some manner for which a licence is not required under the Act. In order

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to determine whether the plaintiff is a "primary grain dealer" within the meaning of the definition, it must be ascertained whether the plaintiff falls within any of the classes for which a licence was required under the provisions of the Canada Grain Act before the amendment of 1919 was inserted. If the plaintiff does fall within any of the classes at that time requiring a licence, then the term "primary grain dealer" cannot apply to it. Sections 119 and 215, already referred to, provide that a grain commission merchant must take out an annual licence, and the plaintiff, in my opinion, (if covered by the Act at all) falls within these sections, for definite provision is made in the standard contract for payment of certain commissions to it in connection with the handling of the grain of the producers. This being so, the plaintiff is not subject to the provisions of s. 219A.

Moreover there is a further reason, in my opinion, why s. 219A and the definition of "primary grain dealer" cannot apply to the plaintiff. According to the section, every primary grain dealer must contract in form "H" set out in the schedule to the Act; this form applies to purchasers of grain only, and, this being so, the Legislature could not have intended that the section should apply to the kind of business in which the plaintiff corporation is engaged, for it does not purchase grain.

The defendant does not raise the provisions of ss. 119 and 215 by way of defence, in all probability because s. 215 has been held *ultra vires* by the Court of Appeal for the Province of Manitoba (*Re v. Manitoba Grain Co.*, 66 D.L.R. 406, 37 Can. C.C. 346). See also *The King v. Eastern Term. Elev. Co.*, [1925] 2 D.L.R. 1; *Montreal v. Montreal St. R.* (1912), 1 D.L.R. 681. I might add that I am of the opinion that none of the sections of the Canada Grain Act requiring licences apply to an organization such as the plaintiff. At the time that the licensing sections of the Act were passed, no organization similar to the plaintiff, engaged in the grain business, existed; the pool is a very recent development in the marketing of grain, and when the licensing provisions of the Grain Act were passed, Parliament could not have had such an organization in contemplation.

It is also contended by way of defence that the contract is not enforceable, as being in restraint of trade. This involves the question as to whether or not the doctrine of restraint of trade applies to producers of any particular commodity who

agree among themselves to place their products upon the market through a central agency. The application of the doctrine to co-operative organizations has, I think, been settled by the decision of the Privy Council in the *McEllistrim* case, [1919] A.C. 548. Co-operative organizations had grown up in Ireland for the purpose of manufacturing milk into butter and cheese, and for putting the products on the market in a co-operative way. Up to the time of the decision of the Privy Council in the *McEllistrim* case, the decisions of the Court of Appeal in Ireland upheld the very stringent rules of the Associations prohibiting any members from selling milk to other persons, and fixing liquidated damages for the violation of the rules at a certain rate per cow per day (*Athlacca Co-Op. Creamery v. Lynch* (1915), 49 I.L.T. 333; *Coolmoyne etc. Co-Op. Creamery v. Bulfin*, [1917] 2 I.R. 107). In the *McEllistrim* case, [1919] A.C. 548, an amendment to the rules had been adopted, by which a 3 year restriction was changed to a prohibition for all time, and it was in reality this feature of the case which resulted in a finding that the rule was void as being in restraint of trade. Lords Birkenhead, L.C., Finlay, Atkinson, and Shaw, wrote judgments reversing the Court of Appeal in Ireland, and held the rule void; Lord Parmoor dissented, holding that, under the circumstances, the rule was not unreasonable.

At p. 562, Lord Birkenhead says:—"A contract which is in restraint of trade cannot be enforced unless (a) it is reasonable as between the parties; (b) it is consistent with the interests of the public." And again, at p. 563:—"The real test is, as your Lordships have so often pointed out, does the restriction exceed what is reasonably necessary for the protection of the covenantee?"

Lord Finlay, at p. 571, quotes the words of James, V.-C., in *Leather Cloth Co. v. Lonsont*, L.R. 9 Eq. 345, at p. 353, which words were cited with approval by Lord Atkinson in *Morris v. Sazelby*, [1916] 1 A.C. 688, at pp. 700-1, as follows:—"All the cases, when they come to be examined, seem to establish this principle, that all restraints upon trade are bad as being in violation of public policy, unless they are natural, and not unreasonable for the protection of the parties in dealing legally with some subject matter of contract."

And at p. 572, Lord Finlay further says:—"It is for the party who alleges that there are circumstances sufficient to outweigh the policy of the law against restraint of trade to establish this. 'The onus of proving such special circumstances

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must, of course, rest on the party alleging them': *per* Lord Parker [in *Morris v. Saxelby*], [1916] 1 A.C. 707. Such restraint must be reasonable in the interests of the parties; that is, 'it must afford no more than adequate protection to the party in whose favour it is imposed' and it must not be injurious to the public. I desire to add one more quotation from Lord Parker by citing a passage from the judgment of the Judicial Committee delivered by him in the case of the *Attorney-General of Australia v. Adelaide Steamship Co.*, [1913] A.C. 781, [at p.] 795: 'Though, speaking generally, it is the interest of every individual member of the community that he should be free to earn his livelihood in any lawful manner, and the interest of the community that every individual should have this freedom, yet under certain circumstances it may be to the interest of the individual to contract in restraint of this freedom, and the community if interested to maintain freedom of trade is equally interested in maintaining freedom of contract within reasonable limits.'

And Lord Atkinson, at p. 574, is reported as follows:—"The public is interested in every one of its members having freedom of action to carry on his trade or business, and deal with the property invested in that trade, within the law, as it seems good to him. The deprivation of the subject of that liberty of action in any given instance is, *prima facie*, an injury to the public interest, and, if it is to be excused or justified, must be excused or justified on the ground that it affords no more than adequate protection to those interests of the private parties concerned which they have a right to have protected."

And again, at p. 581, he says:—"My Lords, I think this small rule No. 6, interfering as it does with the individual liberty and freedom of action of the members of this society in their trade or business, and the legitimate use and employment of their property, is *prima facie* contrary to public policy and the public interest, and is void as being a restraint of trade. The question is, does it come within one of the exceptions mentioned by Lord Macnaghten in the *Nordenfjelt Case*, [1894] A.C. 535 [at p.] 565? Is the rule reasonable in reference to the interest of the parties concerned (in this case the society and its members)? Is it also reasonable in reference to the public interest? Is it so framed and so guarded as to afford adequate protection but nothing more than adequate protection to the party in whose favour the restraint is imposed, while at the same time it is in no way injurious to the public?"

And Lord Shaw, at p. 589, says:—"The further remainder of the purpose would appear to be this, that looking to the different objects in view, and particularly to the advantages of co-operation in industry by the manufacturer of butter and cheese from milk, it was legitimate that both parties to this contract, i.e., the society as a whole and the individual member, should agree to enter into a bargain for the supply of milk for a term of years. This, my Lords, appears to me to be an interest in the protection of which the law would not in any ordinary circumstances interfere. Speaking for myself, I may say that the three years' contract of supply which was originally attached as a condition of membership, and which in experience fortunately turned out well, was in my view within the law. Questions of degree may have to be considered in all such cases; but in the present case, my Lords, I am of opinion that the interest of the parties to a contract implied in the membership of such a society cannot be extended to justify the new rules which I have cited."

The object of the plaintiff corporation is set out in the recitals to the agreement, and is expressed as co-operation in the producing and marketing of wheat, "for the purpose of encouraging the business of growing and marketing wheat co-operatively and for eliminating speculation in wheat and for stabilizing the wheat market." The real object of the organization is to promote the co-operative marketing of wheat, and the wheat which it is desired to handle is the wheat of the producer; "ord "grower" appears frequently in the contract; the agreement is referred to as the "Grower's Contract," and "Growers' Certificates" are issued for the purpose of certifying that the holder is entitled to share in any monies that may be available for distribution over and above the initial payment which is fixed by the directors of the organization, and which is paid at the time the wheat is delivered.

Applying the principles set out in the judgments of their Lordships in the *McEllistrim* case, *supra*, I think it may be said that, for the successful operation of a co-operative marketing project, the organization should be assured of a supply of grain in order to warrant the establishment of an expensive organization,—the acquiring of elevators, and other facilities, and the setting up of selling agencies, all of which, according to the evidence, were necessary. The supply of grain must be obtained from the members, i.e., from those entering into the standard contract, and no objection can be taken to that portion of cl.

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5 in the contract which obligates the member to deliver to the plaintiff all the wheat produced by him in the Province for a period of 5 years. This, I think, is the conclusion from the decision of the Privy Council in the *McEllistrim* case.

Clause 5 of the contract, however, goes very much further than this, for it obligates the member to deliver to the plaintiff for a period of 5 years not only all the wheat he produces, but also all wheat "acquired by or for him" during the 5 year period.

Counsel for the plaintiff contended that these words must be read with cl. 1 of the contract, where "Growers of wheat, owners, purchasers, share crop purchasers, tenants, lessors, and lessees of land" are referred to, and they argued that the word "acquired" has reference only to the persons therein named. I am of the opinion, however, the meaning of the word cannot be limited by reference to the classes of persons set out in cl. 1, and that it must be construed in a much wider sense. It must be given its natural and ordinary meaning.

In Bouvier's Law Dictionary, vol. 1, p. 114, it is stated that the word "acquire" means, "to make property one's own;" and in Murray's New English Dictionary, vol. 1, p. 85, the meaning is given as; "To gain, obtain, or get as one's own, to gain the ownership of." Following these definitions, the word must be given a very wide meaning, and includes all wheat where ownership is obtained in any manner whatsoever and for any purpose. It would cover a case where a grower who had entered into the standard contract with the plaintiff was engaged in the business of selling grain in a small way for feed purposes; immediately he purchases grain for the purposes of his business under the terms of the contract he must consign it to the Pool, and defeat the object of his business. Or it might apply to a small grain dealer, who happened to be a producer of wheat and a contract-holder, and who buys and sells grain; all that he buys must, under the terms of the contract, be consigned to the Pool; or again, it might apply to a man who, being a contract-holder, owns a mill and buys grain for the purpose of grinding flour; immediately he makes a purchase he must, according to the contract, consign the grain to the Pool. This portion of the covenant in my opinion is more than is adequately necessary for the business of the plaintiff, is unreasonable, and might very well be oppressive; it is injurious to the interests of the public, and void on grounds of public policy.

The covenant, in my opinion, being partially good, and par-

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tially void as being in restraint of trade, the next question which arises is, whether or not the good portion can be severed from the bad, and that portion which is reasonable be upheld; or, in other words, should the covenant be severed?

In *Mallan v. May* (1843), 11 M. & W. 653, 152 E.R. 967, the defendant by agreement covenanted to become assistant to the plaintiffs in their business as surgeon-dentists for 4 years, and agreed that after that time he would not carry on that business in London, or in any of the towns in England and Scotland where the plaintiffs might have been practising before the expiration of that term. It was held that the first portion of the covenant, i.e., not to carry on business in London, was valid, but that the second part went much beyond what the protection of the interests of the plaintiffs could reasonably require, and that this portion was illegal and void. It was contended that as the covenant was void in part it was void altogether, but the Court held that the valid portion was not affected by the illegality of the other part.

In *Bromley v. Smith*, [1909] 2 K.B. 235, the defendant, while infant, entered into a contract of service with the plaintiff, who carried on business as a miller, baker and corn merchant. The defendant's work consisted of assisting the plaintiff in the bakery business and taking the bread around to customers. The defendant agreed that he would not for 3 years after leaving the plaintiff's employment be directly or indirectly engaged in any of the businesses of miller, baker, hay, straw and corn merchant, or engage in the manufacture of flour, meal, bread, or confectionery, restaurant manager or assistant to such, either wholesale or retail, within a radius of 10 miles. Immediately after leaving the plaintiff's service, the defendant commenced business as baker and confectioner within the prescribed area. It was held that the agreement was more than was necessary for the protection of the plaintiff's business, but that the portion of the agreement which restrained the defendant from carrying on the businesses in which the plaintiff was not engaged at the time the agreement was entered into, was severable from the remainder of the covenant, and that, as the remainder of the covenant was for the defendant's benefit, he could be restrained from engaging in the business of baker and confectioner within the limited area.

In *Haynes v. Doman*, [1899] 2 Ch. 13, at p. 24, Lindley, M.R., in discussing whether a restriction on trade must be treated as wholly void because it is so worded as to cover cases

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which may possibly arise, and to which it cannot reasonably be applied, said:—"This contention has been considered and repudiated when the restriction is so worded as to be divisible into distinct portions, not depending on each other. In all such cases the restriction is not held void in toto, but is held to be good so far as it is free from objection, and bad only as to those parts which are objectionable."

While I think the weight of authority supports the principle set out in the cases above referred to (Leake on Contracts, 7th ed., p. 585), the doctrine of severance has had some doubt cast upon it in some cases to which I desire now to make a brief reference.

In *Mason v. Provident Cloth. & Supply Co.*, [1913] A.C., at p. 745, the doctrine of severance was much criticised by Moulton, L.J., as follows:—"I do not doubt that the Court may, and in some cases will, enforce a part of a covenant in restraint of trade, even though taken as a whole the covenant exceeds what is reasonable. But, in my opinion, that ought only to be done in cases where the part so enforceable is clearly severable, and even so only in cases where the excess is of trivial importance, or merely technical, and not a part of the main purport and substance of the clause. It would in my opinion be pessimi exempli if, when an employer had exacted a covenant deliberately framed in unreasonably wide terms, the Courts were to come to his assistance and . . . carve out of this void covenant the maximum of what he might validly have required."

In *Attwood v. Lamont*, [1920] 3 K.B. 571, at p. 594, Younger L.J., adopts the statement of Moulton, L.J., in its entirety; but on the other hand Lord Sterndale, M.R., in the same case, after a reference to the decision of the Court of Appeal in *Goldsoll v. Goldman*, [1915] 1 Ch. 292, per Kennedy, L.J., at p. 299, and to *Nevanas v. Walker*, [1914] 1 Ch. 413, per Sargant, J., at p. 423, said (p. 577):—"I think, therefore, that it is still the law that a contract can be severed if the severed parts are independent of one another and can be severed without the severance affecting the meaning of the part remaining."

In *Nevanas v. Walker*, [1914] 1 Ch., at p. 423, Sargant, J., in referring to the remarks of Moulton, L.J., in the *Mason* case, *supra*, said:—"I do not think that those remarks were intended to be applicable to cases where the two parts of a covenant are expressed in such a way as to amount to a clear severance by the parties themselves, and as to be substantially equivalent to two separate covenants."

In the present case, the covenant is, to deliver to the Pool all the wheat "produced or acquired by him or for him." The covenant to deliver the wheat "produced" is not dependent upon that part of the covenant to deliver wheat "acquired." The one can be separated from the other without injury to the part remaining. Even accepting the statement of Moulton, L.J., in the *Mason* case, adopted by Younger, L.J., in *Attwood v. Lamont*, *supra*, I think it may well be said in this case that the part which is enforceable is clearly severable, and that the excess beyond what is reasonable is trivial, and is not of the main substance of the clause in question. Moreover I am of opinion that in the present case sound principle requires that the agreement should not be held void *in toto*, but only in so far as it is unreasonable. The defendant is sufficiently protected against the unreasonableness of the covenant, and against any possible oppression which might arise from it, without holding the agreement void *in toto*. The public is also sufficiently protected, and I cannot see that public policy requires more.

It was pleaded by the defendant that the agreement is void because it has not been executed under the seal of the plaintiff corporation. This defence is disposed of by s. 8 of the Act to Incorporate the Saskatchewan Co-operative Wheat Producers, Ltd., wherein it is enacted that the corporate seal is not required.

The defendant also sets up s. 498 of the Cr. Code, and says the plaintiff is guilty of an offence under that section. The section provides in part:—"Every one is guilty of an indictable offence . . . who conspires, combines, agrees or arranges with any other person, or with any railway, steamship, steamboat or transportation company,— . . . (d) to unduly prevent or lessen competition in the production, manufacture, purchase, barter, sale, transportation or supply, of any such article or commodity, or in the price of insurance upon person or property."

The words "such article or commodity" refer to the words in s.s. (a): "any article or commodity which may be a subject of trade or commerce."

In *Weidman v. Shragge*, 2 D.L.R. 734, at pp. 760-1, 20 Can. C.C. 117, Anglin, J., (now C.J.C.) points out—in discussing the meaning of the word "unduly," that the prime question is, whether improper, inordinate, excessive, or oppressive restrictions have been placed upon competition, the benefit of which is the right of everyone. See also remarks of Sir Charles Fitzpatrick, C.J., at p. 738, and of Duff, J., at pp. 755 *et seq.*

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The question before us is, whether in the contract under consideration the parties agreed "to unduly prevent or lessen competition in the . . . purchase, barter or sale" of wheat. In answering the question, one must of course bear in mind that the evidence shows that the contract in question is only one of a very large number, covering fully 50% of the wheat produced in the entire Province. On its face the contract says that its object is to encourage the co-operative marketing of wheat, and "for eliminating speculation in wheat and for stabilizing the wheat market." There is nothing stated in the agreement as to the prices at which the commodity is to be sold; the plaintiff sells all the wheat handled by it, and the proceeds are divided among the growers; the contract cannot be said to be one "to unreasonably enhance the price" of the commodity; indeed any agreement with respect to the wheat crop of the Province fixing a price, would in all probability be useless, considering the nature of the commodity involved, and the outside influences which affect its price from time to time. The desire expressed in the contract to eliminate speculation, cannot be said to be an effort "to unduly prevent or lessen competition," for even if the result should be the lessening of speculation, substantial competition in the purchase would still exist and at the market-price, which, according to the evidence, is not fixed and cannot be fixed in this Province. The "stabilizing of the wheat market" cannot be said to "unduly prevent and lessen competition," for whatever stabilizing of the wheat market can be accomplished by placing the whole wheat crop of this Province in the hands of a central selling agency, must, in my opinion, be confined within very narrow limits, for there must still exist the same competition for the purchase of the crop from outside the Province and this competition, depending upon the supply elsewhere, must largely determine the price. Moreover, considering the whole evidence, I must say that I cannot find anything which would warrant a finding that the intention of the plaintiff in entering into the contract in question was to "unreasonably enhance the price" of wheat, or to "unduly prevent or lessen competition" (*A.G. Australia v. Adelaide SS. Co.*, [1913] A.C. 781).

It remains to consider the question of the damages to which the plaintiff is entitled.

Clause 25 of the contract, above set out, contains the provision as to damages in case of breach by the defendant. It contains a statement that the remedy at law would be inade-

quate, and a reference to the impracticability and extreme difficulty of determining the actual damage which would result to the plaintiff in case the grower fails to deliver his wheat as agreed, and it is provided that the grower will pay the sum of 25c per bus. for all wheat delivered otherwise than to the plaintiff, as liquidated damages for the breach of contract. The defendant contends that the provision amounts to a penalty.

On the argument many cases were cited, among them the following leading authorities: *Clydebank Eng. & Shipbldg. Co. v. Castaneda*, [1905] A.C. 6; *Public Wks. Com'r v. Hills*, [1906] A.C. 368; *Webster v. Bosanquet*, [1912] A.C. 394; *Dunlop Pneumatic Tyre Co. v. New Garage & Motor Co.*, [1915] A.C. 79; *Lord Elphinstone v. Monkland Iron & Coal Co.*, 11 App. Cas. 332.

Lord Halsbury, L.C., in the *Clydebank* case, in delivering the judgment of the Privy Council, says ([1905] A.C., at p. 10):—"It is impossible to lay down any abstract rule as to what it may or it may not be extravagant or unconscionable to insist upon without reference to the particular facts and circumstances which are established in the individual case." See also remarks of Lord Davey, at pp. 17-8.

Lord Mersey in *Webster v. Bosanquet*, after pointing out that the cases in which the question has been considered are innumerable, and difficult to reconcile, says ([1912] A.C., at p. 398):—"From that case (the *Clydebank* case, *supra*) it appears that whatever be the expression used in the contract in describing the payment, the question must always be whether the construction contended for renders the agreement unconscionable and extravagant and one which no Court ought to allow to be enforced."

As pointed out by Lord Halsbury, L.C., in the *Clydebank* case, no rule can be laid down as to what is or what is not exorbitant, and the circumstances in each case must be considered, the nature of the transaction involved, the thing contracted to be done, and the loss which is likely to accrue by reason of the breach of the contract.

The contract under review authorizes the plaintiff to deduct 1% from the gross selling-price of the defendant's wheat for the purpose of establishing a commercial reserve and also to deduct 2c per bus., which sum is to be used for the purpose of establishing facilities for the handling of grain. By reason of the defendant's failure to carry out the terms of the contract, the plaintiff has been deprived of these sums,—what further

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amount did the plaintiff lose by reason of the breach? None is established by the evidence, and no effort was made to establish any definite sum. The plaintiff contents itself with saying that it is impossible to estimate the damage. It is true that parties may agree to a stipulation as to liquidated damages when the nature of the damage is such that proof of it is extremely difficult, and in such a case there may be a probability that the "pre-estimated damage was the true bargain between the parties" (Lord Dunedin in *Dunlop Pneumatic Tyre Co. v. New Garage & Motor Co.*, [1915] A.C., at p. 88). But if the amount stipulated appears unreasonable and unconscionable considering all the circumstances of the case, then the mere fact that accuracy of estimate cannot be attained, does not warrant a finding that the plaintiff is entitled to the amount stated as liquidated damages.

Counsel for the plaintiff, in arguing that there was actual damage by reason of the breach of contract, in addition to the sums covenanted to be paid under the terms of the contract, pointed out that, on the strength of the contracts entered into, —covering fully 50% of the wheat acreage of the Province,—the plaintiff created an organization capable of handling a certain volume of grain, organised selling agencies, and made contracts in advance with the millers of Europe and with transportation companies, in order that there might be a continuous flow of grain to the market; and he argued that, if default in the growers' contract took place to any large extent, the plaintiff would be unable to fulfill its obligations, and disaster would follow to the organization. The officials of the plaintiff corporation in their evidence emphasize these features of the case, and speak of the disaster which would follow in case any substantial number of growers failed to carry out their agreements.

I must say I cannot appreciate the emphasis placed upon the possibility of other growers breaking their agreements. This is an action against the defendant for breach of his contract, and what others had done or may do, does not affect him. The question is, what damage has the defendant's breach of contract caused the plaintiff? The emphasis placed upon the importance of preventing growers from breaking their contracts, convinces me that the sum of 25c per bus. was placed in the contract in *terrorem* of the grower, and not as a genuine pre-estimate of damage. Furthermore, argument that expensive facilities were established on the strength of the contracts, and that the damage caused by the defendant's failure to deliver

cannot be estimated, is met, to a large extent at least, by the fact that the amount of 2c per bus. which every grower is bound by the terms of the agreement to pay, is levied for the very purpose of providing facilities for the handling of grain. The plaintiff has placed its own value on the cost of the facilities, and I cannot see why it should recover more. I may add that, giving the subject the most careful consideration, I cannot conceive of any loss the plaintiff suffered by not handling the defendant's wheat, beyond the loss of 1% of the value of it and 2c per bus. as provided in the contract. The plaintiff is a non-profit corporation; everything above expenses is returned to the growers, and I cannot see how either the plaintiff corporation or the other growers suffered any loss by reason of the fact that, out of the 1924 crop, 1590 bus. less were marketed than would have been had the defendant carried out his contract.

Reference was made on the argument to *Associated Growers B.C. v. B.C. Fruit Land*, [1925] 1 D.L.R. 871, 34 B.C.R. 533, a decision of McDonald, J., of the Supreme Court of British Columbia, in which that Judge, in dealing with a very similar provision to that under consideration, said (p. 877):—"I am satisfied, upon the evidence, and from a perusal of the agreement . . . that the parties with a full realization of the practical impossibility of ascertaining the amount of damages to be suffered in case of a breach of the contract, honestly endeavoured to pre-estimate such damage and that the rate of 25c per box is to be looked upon as liquidated damages and not as a penalty."

What evidence the Judge had before him, does not appear, but he was satisfied that the parties had honestly endeavoured to pre-estimate the damage. In the present case there is no evidence whatever that the parties "honestly endeavoured to pre-estimate the damage;" the only consideration which was given to the subject was given by the plaintiff or its representatives. There is no evidence that the defendant considered the question.

I must conclude that the sum stated in the contract of 25c per bus. is a penalty, and limit the amount to which the plaintiff is entitled to the actual damage suffered, namely, 1% on 1590 bus. at \$1.66 per bushel, which amounts to \$26.39, and 2c per bus., which amounts to \$31.80—a total of \$58.19.

The appeal should be allowed with costs, the judgment below

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set aside, and judgment entered for the plaintiff for the sum of \$58.19 and costs.

Appeal allowed.

MACKAY v. LAROCQUE.

(ANNOTATED)

Ontario Supreme Court, Appellate Division, Mulock, C.J.O., Magee, Hodgins, Ferguson and Smith, J.J.A. June 29, 1926.

Companies V A—Floating charge—What constitutes—Test.

A mortgage or charge on the assets of a company is a floating charge if it is a charge on a class of assets of the company both present and future, if that class is one which in the ordinary course of the company's business would be changing from time to time, and if, by the charge it is contemplated that, until some future step is taken by or on behalf of those interested in the charge the company may carry on its business in the ordinary way as far as concerns that particular class of assets.

[*Re Yorkshire Woolcombers Ass'n*, [1903] 2 Ch. 234, applied.]

Chattel Mortgages and Bills of Sale III—Floating charge—Registration—Not necessary.

A floating charge on the assets of a company does not require registration under the Bills of Sale and Chattel Mortgage Act, R.S.O. 1914, c. 135.

APPEAL by the Capital Trust Corp., a defendant, from the judgment of Fisher, J., [1926] 1 D.L.R. 551, 58 O.L.R. 305. Varied.

F. H. Chrysler, K.C., and *W. R. West*, for the corporation, mortgagees, appellants.

G. H. Kilmer, K.C., and *T. A. Beament, K.C.*, for the plaintiffs and the trustee in bankruptcy of *J. A. Larocque Company Ltd.*, respondents.

MULOCK, C.J.O., concurs with SMITH, J.A.

MAGEE, J.A. (dissenting), concurs with FERGUSON, J.A.

HODGINS, J.A.:—The questions raised are important.

I find in *Prideaux's Precedents in Conveyancing*, 22nd ed., pp. 171-2-3, the usual forms of "floating charges," such as debentures and mortgages to secure debentures, and the trust company here asserts that the proper designation of its security is a "floating charge." I take that to mean such security as these forms illustrate, which have in the like or similar language become the subject of many English decisions.

In one precedent (p. 172) the operative word is "charge," and the property charged is the "undertaking and all their

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[APPELLATE DIVISION.]

McCOOL V. GRANT & DUNN.

*Contract—Formation—Sale of Goods—Written Offer—Written Answer—
"We are Prepared to Accept"—Condition of Acceptance—Fulfillment—
Intention.*

The parties had been bargaining for the purchase and sale of a stock of lumber, and everything had been finally agreed upon and settled between them, except that the sellers desired assurance satisfactory to their bankers as to the buyer's financial standing. The defendants' written answer to the plaintiff's written offer to buy contained the words: "We are prepared to accept your offer provided you can satisfy our bank that all this stuff will be paid for as per our conversation." The defendants' bankers were, in due course, satisfied, and so informed the plaintiff's bankers:—

Held, having regard to all the circumstances, that there was a completed contract—that a sale was made subject to the bankers being satisfied as to the financial standing of the buyer; and the plaintiff was entitled to damages for breach of the contract.

Judgment of Rose, J., reversed.

An action for damages for breach of an agreement to sell and deliver a stock of lumber.

The action was tried by Rose, J., without a jury, at Haileybury.

J. M. Ferguson and W. A. Gordon, for the plaintiff.

F. L. Smiley, for the defendants.

December 31, 1920. Rose, J.:—After negotiations by which a price was arrived at, the plaintiff, in the defendants' office, and at the defendants' request, wrote to the defendants a letter offering to buy the lumber at a stated price (which was the price agreed upon), and setting out the terms of payment and the manner in which the lumber was to be sorted, shipped, etc.; and the defendants thereupon wrote and delivered to him a letter in which they said: "Referring to our conversation and your offer . . . will say we are prepared to accept your offer provided you can satisfy our bank that all this stuff will be paid for as per our conversation."

The plaintiff then saw the defendants' banker, whose name had been announced by the defendants, and the defendants' banker wrote to the plaintiff's banker for information as to the plaintiff's financial standing. The information having been given on the telephone, and the plaintiff's banker having promised to confirm his statement by letter, the defendants' banker informed one of

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the defendants as to what it was, and afterwards, after the confirming letter had been received, but without instructions from the defendants to do so, wrote to the plaintiff's banker saying: "This report is indeed very satisfactory, not only to us but to our client. We have also had a report as to Messrs. G. A. Grier & Sons, of Montreal, which verifies your statement."

Messrs. Grier & Sons were dealers to whom the plaintiff was reselling the lumber: the defendants say, and the plaintiff denies, that the plaintiff had told the defendants that he was buying as agent for Messrs. Grier & Sons; and the defendants say that what they were concerned about was not so much the financial standing of the plaintiff as the standing of the persons for whom they supposed him to be acting.

The plaintiff's case is, that the defendants' letter above quoted was a conditional acceptance of his offer; that he performed the condition, by satisfying the bank that the lumber would be paid for; and that, thereupon, there was a binding contract. The defendants say that what they meant was merely to state what they intended to do in case the report obtained by their banker was satisfactory to them; they say that the report obtained was not what they required; and they deny that there ever was a complete contract.

What the defendants say as to the intention with which they wrote their letter is, I take it, immaterial; the question is, what do the words mean, either standing alone or construed in the light of the circumstances in which they were used? That the expression, "I am prepared to accept (a certain price)" may, under certain circumstances, amount to an offer to accept such price appears from Mr. Justice Middleton's judgment in *Canadian Dyers' Association Limited v. Burton* (1920), 47 O.L.R. 259; but, after some hesitation, I have reached the conclusion that the words, "we are prepared to accept your offer," used as they were used in the defendants' letter, in this case, do not amount to an acceptance. Both the plaintiff and the defendants were accustomed to dealings in lumber and well knew the necessity for a complete written record of any contract; and this circumstance seems to me to demand that the words used by them in their letters shall be construed almost with the strictness which would be applied in the case of a formal document; and I cannot think that in the inter-

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1920

McCool

v.

GRANT &

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pretation of a formal document a clause to the same effect as the whole sentence quoted from the defendants' letter would be treated, unless in very exceptional circumstances, as meaning the same thing as "we accept your offer," etc. The words "are prepared to" must have been inserted for some purpose, and it is difficult to give any meaning to them unless the whole sentence is taken to amount to a statement merely that the defendants' intention was to accept the offer at a future time if something happened in the meantime.

There is, perhaps, a further difficulty in the plaintiff's way. If the letter amounts to an acceptance upon condition, the plaintiff must shew strict performance of the condition; and, in doing that, the first thing is to shew exactly what the condition is. Now, reading the letter literally, the condition is that the bank shall be satisfied that the lumber will be paid for *as per the conversation between the parties*. If that was the condition, it would not be possible to find, on the evidence, that it was fulfilled. The plaintiff, therefore, cannot succeed unless it is permissible to read the letter as saying what I am inclined to think the writer of it intended to say, viz., "provided, as per our conversation, that you can satisfy our bank that all this stuff will be paid for." However, the question as to the construction to be given to the words "as per our conversation" was not argued, and, as the action fails upon the ground that the letter was not an acceptance of the offer, it is unnecessary to decide this second point.

The action must be dismissed with costs.

The plaintiff appealed from the judgment of ROSE, J.

February 22, 1921. The appeal was heard by MEREDITH, C.J.C.P., LATCHFORD, MIDDLETON, and LENNOX, JJ.

J. M. Ferguson, for the appellant.

H. D. Gamble, K.C., for the defendants, respondents.

March 11. The judgment of the Court was read by MEREDITH, C.J.C.P.:—That the writings which passed between the parties on the 17th January, 1920, were intended to be binding upon them, seems to me to be beyond doubt. The parties had been bargaining for the purchase and sale of the lumber described in

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them, and everything had been finally agreed upon and settled between them, except that the sellers desired assurance satisfactory to their bankers, who had some charge upon the lumber, as to the buyer's "financial standing:" the sellers naturally wanted to be made safe in regard to payment for their lumber.

Mr. Grant, who conducted the negotiations for the defendants throughout, was, at the trial, given the fullest opportunity to state, or suggest, any reason for the writings if they were not to be binding upon any one, and, as was to have been expected, was quite unable to do so.

On the 21st January, 1920, the plaintiff wrote to the defendants a letter beginning with the words: "In reference to my contract with you for your cut of jack pine and spruce lumber;" which the defendants answered on the 23rd January, 1920, without a word of repudiation of the assertion of a contract, but objecting to the mode of sorting the lumber which the plaintiff's letter had asked for: and as to the finality of the sale saying only, "I have had no definite information from our bank yet;" and it was not until early in the next following month of February that the defendants shewed any disposition to recede from their agreement.

The grounds upon which the plaintiff failed at the trial appear to have been: that the parties intended that any agreement between them should be in writing; and that the writings which passed between them did not sufficiently prove a completed sale, by reason of the words: "We are prepared to accept your offer provided you can satisfy our bank that all this stuff will be paid for as per our conversation," contained in the defendants' written answer to the plaintiff's written offer to buy.

But, having regard to all the circumstances, I can perceive no sufficient reason why they may not have the meaning they were intended to have: that the sale was made subject to the bankers being satisfied as to the financial standing of the purchaser.

To give them any other meaning would make the writings, which were intended to be evidence of some bargain, of no effect whatever; and to give them any other meaning would be to give them a meaning which none of the parties thought they had, as their conduct, in writing the offer and answer, and exchanging them, as well as in subsequent correspondence and acts, makes plain.

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v.

GRANT &
DUNN.

Meredith,
C.J.C.P.

App. Div.
1921

McCool
v.

GRANT &
DUNN.

Meredith.
C.J.C.P.

The defendants' bankers were, in due course, satisfied, as their letter of the 29th January, 1920, shews, in these words: "We thank you for your letter in reference to Mr. McCool's standing. This report is indeed very satisfactory, not only to us but to our client." At the trial the writer of that letter testified that he informed Mr. Grant of the information he had had respecting the plaintiff's financial standing, and that he understood from him that he was satisfied with it, and that it was Mr. Grant's attitude then that prompted him to write the letter from which the words I have quoted are taken. Though, it may be added, the requirements of the contract are only that the bankers should be satisfied.

I am in favour of allowing the appeal and of directing that judgment be entered in the action for the plaintiff,

Appeal allowed.

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ONT.
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DITH, C.J.C.P., of the 27th March, 1913, in favour of the plaintiffs, in an action to restrain the defendant from locating or proceeding with the location and erection of an apartment house on Laburnam Avenue, in the city of Toronto.

W. C. Chisholm, K.C., for the defendant.
Irving S. Fairty, for the plaintiffs.

The judgment of the Court was delivered by MEREDITH, C.J.O.:—The appellant is not entitled to succeed if *City of Toronto v. Williams*, 8 D.L.R. 299, 27 O.L.R. 186, was well decided; and we are asked to overrule it.

In our opinion, the Court in that case came to the right conclusion, and we agree with it, as well as with the reasoning on which it is based, and with the reasoning of the learned trial Judge, to which we cannot usefully add anything.

The appeal is dismissed with costs.

Appeal dismissed.

B. C.
1913

HARKNESS v. PLEASANCE.

British Columbia Supreme Court. Trial before Clement, J. May 17, 1913.

CONTRACTS. (§ ID 2—54)—Acceptance — Definiteness—Delay for Consent of Third Party.]

TRIAL of action for specific performance of an agreement for the sale of a lease and house contents. The defendant had gone into possession pending the deposit of the bill of sale and assignment of lease with the solicitors for delivery, on obtaining the consent of a third party having an interest in the lands. Such consent was obtained within a month of the transaction, but meanwhile the purchaser repudiated, claiming that there was no contract prior to the consent being obtained. The vendor sued for specific performance.

W. P. Ogilvie, for plaintiff.
F. M. McLeod, for defendant.

CLEMENT, J., held that the contract was effective as of its date, subject to the consent being obtained, and that there was no right to withdraw, pending the reasonable delay for obtaining such consent as arranged between the parties:

MAN.
1913

SIMONSON v. CANADIAN NORTHERN R. CO.

Manitoba King's Bench, George Patterson, K.C., Referee. June 19, 1913.

JURY (§ ID—31)—Jury Notice—Motion to Strike Out.]—Defendants moved to set aside the notice of trial in this case

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Ontario Weekly Notes

[1937] O.W.N. TORONTO, DECEMBER 17, 1937. No. 42

COURT OF APPEAL.

DECEMBER 8TH, 1937.

NICHOL v. DIXON.

CLANCEY v. DIXON.

Contracts—Damages—Option given to purchase real property—Covenant by vendor in option agreement to prosecute certain litigation with tenant as vigorously as possible—Option conditional upon success of vendor in litigation—Settlement of litigation with tenant—Breach by vendor of covenant to prosecute litigation vigorously—Measure of damages.

Appeals by the plaintiff in each of two actions from judgments of His Honour Judge Honeywell, of the County Court of the County of York, dismissing the actions.

The appeals were heard together by Middleton, Masten and Henderson, JJ.A.

E. G. Black, for the plaintiffs, appellants.

R. M. W. Chitty, for the defendant, respondent.

Middleton J.A., delivering the written judgment of the Court, said that Sarah Dixon was the owner of certain hotel premises in the Town of Barrie, subject to certain encumbrances and subject also to a lease. There was litigation with the tenant and it was quite uncertain what the outcome of this litigation would be.

An option was given by Mrs. Dixon to the late Joseph L. Nichol to purchase the land for \$8,500 if Mrs. Dixon should succeed in the litigation with the tenant and so should be able to deliver possession of the hotel. The option agreement provided that "this option shall extend until litigation pending for possession of the said hotel has been completed, and I covenant and agree to prosecute such litigation as vigorously as possible".

49—O.W.N.—[1937]

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Mrs. Dixon did prosecute the litigation in a manner not complained of until the eve of the trial when she was advised that, in view of the facts which then developed, defeat might be regarded as a certainty. She then settled the litigation on terms under which the tenant was to remain in possession of the property and at a lower rental. This was a breach of her contract to prosecute the litigation to its conclusion and she is liable for damages for breach of the contract.

The contract of which she was guilty of a breach was a contract to hold the offer open until after the litigation had been ended. This deprived the plaintiff of his right to accept the offer of purchase and to become the purchaser of the property. She is liable for the breach of the option contract and not liable for breach of the contract, never completed, to buy the property.

On the interpretation of this contract this Court is unanimously of the opinion that the agreement was to prosecute the action until terminated, not to appeal the judgment that might have been given at the trial.

The damages must be estimated, not in the view of a completed contract to purchase, but in view of the uncertainty as to the result of the litigation. The evidence is extremely meagre and unsatisfactory, but this Court must assess the damages. After some consideration the Court has concluded that the damages should be limited to \$150.00. This sum is arrived at as a jury might, viewing all the circumstances and the slight chance there was of any satisfactory conclusion to either of the parties being arrived at with the tenant.

The appeal in the first action should therefore be allowed and judgment be entered for \$150.00 with County Court costs.

The second action, *Clancey v. Dixon*, is upon a contract to pay commission. The contract there is to pay upon the completion of the sale. There has been no completion and the action and appeal fail. This appeal will be dismissed with costs.

Appeal in first action allowed with costs; appeal in second action dismissed with costs.

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[COURT OF APPEAL]

Aldercrest Developments Ltd. v. Hunter et al.

23RD FEBRUARY 1970.

AYLESWORTH, MACKAY
AND LASKIN, J.J.A.

Sale of land — Specific performance — Contract subject to the obtaining of necessary Planning Board consents — Whether specific performance of entire contract to be decreed — Whether specific performance of obligation to obtain consents to be decreed.

A contract for the sale of land was subject to the obtaining of the necessary Planning Board consents to the transfer of the land under s. 26 (am. 1960-61, c. 76, s. 1) of the *Planning Act*, R.S.O. 1960, c. 296. Although the agreement did not cast the burden of obtaining the necessary consents on the vendors, correspondence between the solicitors of the parties showed that the vendors undertook to seek the consents. Accordingly a decree of specific performance directing the vendors to make the requisite applications for consent of the severance should have been granted to the purchaser at trial.

In the absence of a formal application for the consent it would have been mere speculation to conclude that severance would inevitably have been withheld and hence that the plaintiff suffered no damage.

Perpetuities — Contract for sale of land to be completed "90 days after Planning Board approval" — Whether rule against perpetuities offended.

A contract for the sale of land to be completed "90 days after Planning Board approval" does not violate the rule against perpetuities. The rule only applies to the commencement, not the duration of the interest, and under the contract the purchaser obtained an immediate equitable interest.

[*Harris v. M.N.R.*, [1966] S.C.R. 489, 57 D.L.R. (2d) 403, [1966] C.T.C. 226, *referred to*; *Re Pongracic*, [1962] O.R. 1132, 35 D.L.R. (2d) 478; *Turney and Turney v. Zhilka*, [1959] S.C.R. 578, 18 D.L.R. (2d) 447, *distd*]

APPEAL from a judgment of Brooke, J., dismissing an action for specific performance of a contract for the sale of land.

Brian W. B. Morison, Q.C., for plaintiff, appellant.
G. J. Smith, for defendants, respondents.

The judgment of the Court was delivered by

LASKIN, J.A.:—The plaintiff appeals from a judgment of Brooke, J., as he then was, of March 3, 1969, dismissing its action for specific performance of a contract for the sale of land. The learned trial Judge found, and rightly so, that, in the circumstances, specific performance could not be granted even if the merits were with the plaintiff; but in finding for

the defendants on the merits he fixed the damages, claimed in the alternative against them, to abide an appeal.

On March 31, 1965, the parties entered into a home-drawn agreement, by adaptation of a printed form, for the sale by the defendant Hunter (his wife joining to bar dower) of a six-acre section of his larger farm to the plaintiff company. By letter of December 16, 1966, the real estate agent who had acted for Hunter in the negotiation of the contract of sale purported to cancel the contract on his behalf. At this very time, solicitors for the respective parties, who had taken over the conduct of the matter *inter partes*, were still in correspondence with each other on the contract, and reference will be made below to their exchange of letters as it bears on the issues that arise.

Although the printed form of the contract recited that time was of the essence, it is common ground that this provision was outflanked by the terms, both typed and handwritten, introduced into the printed form by the parties. These terms are, indeed, the only ones relevant to the questions that call for decision, and I set them out so far as relevant, as follows, with my numbering:

1. The purchaser acquiring all consents, approvals licences and/or permits to enable it to construct single and multiple residential dwellings.
2. To have access to and the right to use the water and sewage facilities of the Town of Hagersville in front of the property.
3. To have the subject lands approved by C.M.H.C. for mortgage lending purposes and the purchaser arranging adequate financing for the construction of single and multiple residential dwellings.
4. The contract constituted by the acceptance of this offer is subject to the provisions of Section 26 of the Planning Act which requires a land severance consent from the appropriate planning board.
5. The cost of securing the necessary surveys outside boundaries only to be borne jointly by the vendors and the purchasers.
6. Closing date to be 90 days after Planning Board approval.

Apart from this last-mentioned cl. 6 there is no closing date provision in the contract; and it was argued *in limine* by the defendant respondents that the clause violated the rule against perpetuities, which applied in its common law vigour to this transaction because it antedated the *Perpetuities Act*, 1966 (Ont.), c. 113. This Court is, of course, bound by *Harris v. M.N.R.*, [1966] S.C.R. 489, 57 D.L.R. (2d) 403, [1966] C.T.C. 226, holding that the rule applies as between original contracting parties as well as to remote parties involved in a transaction respecting a contingent interest in land. I do not agree, however, that the rule was violated in the present case.

Upon the execution of the contract herein, the purchaser acquired an interest in the particular land, but there is the argument (if I may spell it out for the respondents) that for an undeterminable time extending possibly beyond the perpetuity period it will not be known whether the purchaser's interest will be supplemented by a legal title in fee simple or whether Hunter's full interest will be restored. Of course, if it were not the case that the purchaser was a corporation, this argument would be untenable in respect of an individual purchaser and on the construction of the contract as personal to him; necessarily, the approval would have to be sought in his lifetime. But, even on the facts as they are, I see no reason to be astute to find new applications of a now statutorily-modified rule. The present case does not concern an option to purchase or to repurchase land, and cases like *Re Pongracic*, [1962] O.R. 1132, 35 D.L.R. (2d) 473, have, accordingly, no relevance. Moreover, the rule against perpetuities does not apply to the duration of an interest but only to its commencement. Here, on the execution of the contract of sale, the purchaser obtained an immediate equitable interest, subject to perfection or defeasance of title on the performance or non-performance of contractual conditions; and in the absence of specified time limitations, the standard of reasonableness is applicable. In these circumstances, we are not concerned with any interest in land to arise and vest in the future, as this central feature of classic perpetuity situations has been traditionally understood.

The perpetuity point aside, the disposition of the appeal turns on the character of the terms or conditions numbered 1 to 5 above-quoted, and whether their literal non-fulfilment (as found by the learned trial Judge) stood in the way of relief for the plaintiff. The trial Judge also found that the terms (other than the clause relating to surveys) were true conditions precedent which could not be unilaterally waived, even if they were for the benefit of the purchaser; but it was his opinion that they were also for the benefit of the vendors.

It is my view that the key to this case lies in understanding the necessary order of priorities in satisfying the conditions, and I am content in this respect to agree that conditions 1, 2 and 4 at least are the true conditions precedent. There is no doubt that the purchaser sought the six-acre section for a residential subdivision development, and the evidence shows that, shortly after the contract of sale was executed, a survey was prepared and the purchaser appeared at a meeting of the Council of Hagersville to ask for installation of water and

sewer mains. The particular land was not then part of that municipality but annexation was contemplated, and both the approval of any plan of subdivision and the installation of water and sewer mains were (according to minutes of meetings of the relevant municipal authorities) to be held up until annexation was accomplished. This did not come until the late summer of 1966 and explains why implementation of the contract of sales appeared to be at a standstill for about one year.

The minutes of the Hagersville and Suburban Planning Board of a meeting on September 1, 1966, discloses a resolution of approval in principle of a plan of subdivision proposed by the purchaser, "subject to a more formal application to be made on Departmental forms for submission to the Minister of Planning and Development". On September 23, 1966, the plaintiff's solicitor wrote to the solicitor for the defendants, that he would be in a position to close on November 30, 1966; there had been "some substantial difficulty in dealing with the various municipalities and C.M.H.C. but [the purchaser] has satisfied itself that it is now able to complete the contract". In reply, the defendants' solicitor wrote on October 4, 1966, that Hunter advised that he would refuse to complete unless closing was not later than October 30, 1966; and the solicitor added that if there was reasonable assurance that the matter would be closed approximately by the end of October he could "smooth the troubled waters". To this letter plaintiff's solicitor replied under date of October 17, 1966, stating he was prepared to close on October 30, 1966, and asking for a draft deed and a statement of adjustments as of that date. Follow-up letters indicated the purchaser's appreciation that favourable action on the part of the Committee of Adjustment was required and that it expected the application to be made by the vendors.

The reference was to the necessity of official consent to the severance of the six-acre section, as a prerequisite to conveyance, as required by s. 26(1) [rep. & sub. 1960-61, c. 76, s. 1] of the *Planning Act*, R.S.O. 1960, c. 296. A subdivision control by-law was in force in the area, and hence s. 26(1) aforesaid applied. Some elaboration is desirable on this point in view of certain opposing contentions of the parties and of the fact that relevant amendments to the *Planning Act* came into force after the contract of sale herein was executed.

The trial Judge construed the closing date provision of the contract as referring to Planning Board approval of the purchaser's proposed plan of subdivision and not to approval

or consent to the land severance. It is plain enough, however, that any proposed plan of subdivision of the six-acre piece of property could not be implemented without a prior consent to its severance from the vendors' total holding. Of course, as counsel for the vendors pointed out, consent to severance was unnecessary where there was a registered plan of subdivision (for which the Minister alone could give approval), but no one had in contemplation a registered plan of subdivision covering the whole farm owned by the vendors at the time the contract of sale was executed. The indispensable first step to the effectuation of the other relevant conditions of the contract was to obtain consent to a severance; the plan of subdivision intended by the purchaser related only to the parcel it was buying.

The *Planning Act*, as it stood at the time of the contract of sale, required the consent of the local Planning Board to a severance, or of the Minister, if there was no local Planning Board. In 1964 the Act had been amended to introduce the Committee of Adjustment as the consenting authority for a severance, or the Minister, if there was no Committee of Adjustment: see the *Planning Amendment Act, 1964 (Ont.)*, c. 90, ss. 1 and 6; but these provisions were not to come into force until proclaimed, and the effective date under a subsequent proclamation was May 3, 1965. Although it does not appear clearly from the record whether a Committee of Adjustment was created for the locality in which the subject land lay, the correspondence proceeded on the basis that such a committee had been established and this is also reflected in the reasons of the trial Judge; and under the legislation the application to the committee for consent to severance had to be made by the owner or any person authorized in writing by such owner. It is obvious, therefore, that the purchaser needed Hunter's co-operation to enable it to seek the consent that would permit it to close the transaction on satisfying as well any other applicable conditions.

No doubt the initiatives had to be taken by the purchaser, but the record shows clearly enough that from September 1, 1966, on the purchaser did push the matter. In reply to its solicitor's letter of October 17, 1966, the defendants' solicitor wrote on October 21, 1966, that his clients had been in to see him and he asked for a copy of the survey prepared by the plaintiff "so that I could take this matter up with my clients and prepare the draft deed assuming the survey is satisfactory". The letter concluded that "it would appear that the deed will have to be submitted to the Committee of Adjust-

ALDERCREST DEVELOPMENTS LTD. V. HUNTER

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ment for their consent, and, of course, this may cause some delay". The survey was sent under date of October 25, 1966, and on October 31, 1966, the purchaser's solicitor wrote again inquiring when application would be made to the Committee of Adjustment.

This last-mentioned letter was acknowledged on November 4, 1966; the vendors' solicitor said he had been endeavouring to get his clients into his office and was writing them again. It appears that the Hunters later that month consulted another firm of solicitors (there is a peremptory letter from them to the plaintiff's solicitor dated November 25, 1966) but they returned to their original solicitor who, under date of December 6, 1966, sent a draft deed and also raised some questions about the description of the land in the light of the survey. He said in his letter that "as soon as you return the draft deed with your comments I will endeavour to have my client come in and execute the deed and make the necessary application to the Committee of Adjustment".

Two responses were made by the plaintiff's solicitor, in the first of which (on December 12, 1966) he commented on the issue as to the description and in the second (on December 16, 1966) the draft deed was returned, approved as to form; the second letter also asked whether there was still any problem with the description. It was under the same date of December 16, 1966, that the purported cancellation of the contract was conveyed in a letter to the plaintiff itself; and as noted at the beginning of these reasons, the notice of cancellation was given by the vendors' real estate agent. Their solicitor was advised of this cancellation, and wrote to the plaintiff's solicitor on December 19, 1966, that the vendors were not prepared to close the deal. Apparently oblivious of all this, perhaps because of delay in mail delivery at that time of year, the plaintiff's solicitor wrote again on December 22, 1966, asking for information on the progress of the application for consent to the severance. No such application had been made by the vendors. At the turn of the year the purchaser's solicitor wrote to the Committee of Adjustment to pursue the question of severance, and the record includes a letter of January 24, 1967, from the secretary of the local Planning Board addressed to Hunter referring to correspondence with the plaintiff and advising of a resolution of that Board that "land that may be severed or subdivided on the Hunter farm be done by an overall plan of subdivision rather than by subdivision control and further that when an application for a plan of subdivision is to be made it be made by the owner of the land".

A writ had been issued on December 27, 1966, but without the required consent to a severance the Court was powerless to grant specific performance. The trial Judge held, however, that if he was wrong in his view of the need of strict compliance with the conditions precedent then it would be his opinion that the defendants "were in breach of an implied condition of the agreement to proceed with the application for consent to land severance or to give authority to the plaintiff so to proceed"; and they could not by their own default defeat the plaintiff's right to damages.

I do not regard the present case as governed in its result by *Turney and Turney v. Zhilka*, [1959] S.C.R. 578, 18 D.L.R. (2d) 447. The principle in that case is applicable here in that neither party promised the other to procure the consent to severance, but the similarity ends at this point. Having regard to the legislation which became effective on May 3, 1965, and to the correspondence between the solicitors, I am of the opinion that the defendants undertook to seek consent to severance, apart entirely from any implication in the agreement to that effect, and that they cannot rely on their failure to do so as a ground for avoiding the contract. They had, through their solicitor, treated it as subsisting up to the time they suddenly purported to cancel it. The plaintiff had been exploring the necessary consents and approvals under the other conditions, but these depended ultimately on the consent to severance which was the key to any successful conclusion of the transaction.

Counsel for the vendors contended that consent to severance would not have been granted and hence the plaintiff suffered no damage. This contention was based on the indications in correspondence with the municipal authorities that they preferred to have the entire Hunter farm become the subject of a registered plan of subdivision. This did not appear clearly until after the repudiation and then only in the letter of January 24, 1967, conveying the resolution of the Planning Board to that effect. It was not the authority responsible for giving consent to severance. In the absence of a formal application to the Committee of Adjustment (or, if in fact there was no such committee, then to the Minister) by Hunter, or on the written authority of Hunter, made before the purported cancellation, it is mere speculation to conclude that severance consent would inevitably have been withheld.

I would allow the appeal and accept the trial Judge's assessment of damages of \$5,000 together with such further sums as may be found due on a reference to the Local Master in

MINISTER OF TRANSPORT FOR ONTARIO V. CANADIAN GEN'L INS. CO. 569

respect of costs incurred in efforts to complete the transaction. The plaintiff should have its costs of the trial and also the costs of the appeal, excluding, however, costs referable to the Appeal Book and appendix thereto. The latter was in deplorable condition and yet had to be resorted to for the pertinent documents and correspondence. It was a necessary part of the Appeal Book although bound separately, and the successful appellant should be denied costs of the whole.

Appeal allowed.

[COURT OF APPEAL]

Minister of Transport for the Province of Ontario v. Canadian General Insurance Co.

5TH MARCH 1970.

MCKAY, MCGILLIVRAY
AND BROOKE, J.J.A.

Insurance — Motor vehicle liability — Unnamed insured — Son driving company car with consent of father (president and general manager) — Whether friend who obtains permission to drive from son only driving with consent of owner, express or implied — Whether vehicle's insurers liable to persons injured by driver's negligence — Insurance Act, R.S.O. 1960, c. 190, s. 223.

Where a car is leased by a private family corporation, a general permission to drive given by the father (president and general manager) to one of his sons does not in itself empower the son to give further consent to others, e.g., a friend, to drive. Accordingly, when such a friend is driving with the consent of the son only and negligently occasions personal injuries and damage on a private road he is not an unnamed insured under the corporation's motor vehicle liability insurance policy and the corporation's insurer is not liable to indemnify him in respect of his victims.

APPEAL from a judgment in favour of an injured third party on a motor vehicle liability insurance policy.

R. E. Holland, Q.C., and R. A. O'Donnell, for defendant, appellant.

W. E. Bell, Q.C., for plaintiff, respondent.

The judgment of the Court was delivered by

MCGILLIVRAY, J.A.:—This is an appeal from the judgment of Hartt, J., whereby the plaintiff was awarded its claim and costs. The plaintiff brings the action as an assignee of a judgment obtained in the Supreme Court of Ontario by Diane Oliver and Adam Oliver against one David C. Mills.

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I N D E X

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OPENING STATEMENT ON BEHALF OF THE PETITIONER
By Mr. Dowd

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EVIDENCE ON BEHALF OF THE PETITIONER

WITNESSES

<u>NAME</u>	<u>DIRECT</u>	<u>CROSS</u>	<u>REDIRECT</u>	<u>RECROSS</u>
Elmer Haikala	5	9		
John McCamus	11	19		

<u>PETITIONER'S EXHIBIT NOS.</u>	<u>DESCRIPTION</u>	<u>IDENT.</u>	<u>EVID.</u>
9	Picture		3
10	Picture		3
11	Curriculum Vitae of McCamus		12

<u>JOINT EXHIBIT NOS.</u>	<u>DESCRIPTION</u>	<u>IDENT.</u>	<u>EVID.</u>
	Stipulation of Facts with attached exhibits		2

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MAID OF THE MIST CORPORATION

Petitioner

vs

COMMISSIONER OF INTERNAL REVENUE

Respondent

NO. 504-76

LOCATION OF HEARING: Buffalo, New York

DATE: November 11, 1976

BEFORE: Honorable Theodore Tannenwald, Jr.

APPEARANCES: John G. Dowd
Attorney for the Petitioner

Louis J. Zeller, Jr.
Attorney for the Respondent

P R O C E E D I N G S

1 THE CLERK: Be seated please. Docket number 504-76,
2 Maid of the Mist Corporation and Affiliated Corporations.
3 Your appearances, please?
4

5 MR. ZELLER: Louis J. Zeller, Jr. for the respon-
6 dent, Your Honor.

7 MR. DOWD: John G. Dowd for the petitioner, Your
8 Honor.

9 THE COURT: Good morning, Mr. Dowd, good morning,
10 Mr. Zeller. Gentlemen you have a Stipulation of Facts, I
11 believe and I understand there will also be either a Supple-
12 menta Stipulation of Facts or supplemental exhibits, is that
13 correct?

14 MR. ZELLER: Yes, Your Honor, there is both a
15 Stipulation of Facts and a Supplemental Stipulation of Facts.
16 Those, along with the exhibits for both of the Stipulations
17 were filed with the Clerk at the calendar call. At this
18 time I'd like to request that both the Stipulations and the
19 Exhibits be received in evidence.

*** 20 THE COURT: It is so ordered. Now, I have a couple
21 of pictures here. Are those -- were those included within
22 the original stipulations?

23 MR. ZELLER: No, Your Honor, I hadn't seen the
24 pictures until Monday morning, so those are not included.
25 However, I'm prepared to orally stipulate to those pictures.

1 MR. DOWD: Your Honor, they're merely offered to
2 better acquaint the Court with the situation.

3 THE COURT: Petitioner's Exhibits 9 and 10 are
4 received in evidence and made part of the record in the case.
5 *** Mr. Dowd would -- I've read your trial memorandae. As I
6 understand it, the question is whether prior to December 18,
7 1971, there was an order.

8 MR. DOWD: That is correct, Your Honor. Prior to
9 December -- December 21st.

10 THE COURT: 21st.

11 MR. DOWD: That's the sole question, I believe.
12 * And also, Your Honor, I would like at this time perhaps to
13 clarify the position of the petitioner. We, in our petition
14 and we, for the record concede that the assessment which
15 arises from the monies claimed subject to investment credit
16 on the crane contract, which was unconditionally executed of
17 the 18th of December, is not in question and we concede that
18 we owe the which is attributable to the amount of that con-
19 tract.

20 THE COURT: Okay. So it's only the one contract
21 that we have in question?

22 MR. DOWD: That's right, Your Honor. The ship
23 contract.

24 THE COURT: Or the one transaction.

25 MR. DOWD: Yes, Your Honor.

1 THE COURT: All right, would you like to make any
2 further opening statement, Mr. Dowd?

3 MR. DOWD: No, Your Honor, I feel that that's
4 sufficient.

5 THE COURT: Mr. Zeller?

6 MR. ZELLER: Your Honor, since respondent has no
7 witnesses and has filed a trial memorandum herein, the respon-
8 dent waives opening statement.

9 THE COURT: All right, you may proceed with your
10 first witness, Mr. Dowd.

11 MR. DOWD: I'd like to call Mr. Elmer Haikala,
12 please.

13 THE CLERK: Raise your right hand, please. You do
14 solemnly swear that the testimony you are about to give the
15 Court in this case will be the truth, the whole truth and
16 nothing but the truth, so help you God?

17 THE WITNESS: I do.

18 THE CLERK: Thank you. Would you take the stand
19 and be seated, please sir. Would you state your name and
20 address for the record, please.

21 THE WITNESS: Elmer Haikala, 150 Erie Street North,
22 Wheatley, Ontario.

23 THE CLERK: Would you spell your last name, please.

24 THE WITNESS: H-a-i-k-a-l-a.

25 THE CLERK: Thank you.

ELMER HAIKALA,

called as a witness, having been duly sworn, took the stand
and testified as follows:

DIRECT EXAMINATION

BY MR. DOWD:

Q Mr. Haikala, what is your -- your business?

A I'm a metal fabricator and a shipbuilder.

Q And where are your shipbuilding yards located?

A Wheatley, Ontario.

Q And in 1971, Mr. Haikala, what was your position
with the shipbuilding company?

A President and General Manager.

Q And what is the proper name of the corporation,
the shipbuilding corporation?

A Hike Metal Products, Limited.

Q All right. Now, Mr. Haikala, did there come a
time when you came in contact with and had certain discussions
concerning the building of a vessel with the Maid of the Mist
Steamboat Company, Limited?

A Yes sir.

Q All right, now, and did there come a time when you
entered into a contract for the construction of what was
known as Maid of the Mist III?

A Yes.

THE COURT: Let the record show that the use of

1 the word contact as used in questions and answers is for
2 descriptive purposes only.

3 MR. DOWD: Descriptive purposes only, Your Honor.

4 THE COURT: Because that may be a legal issue that
5 the Court has to determine.

6 MR. DOWD: That is a legal issue and I don't --

7 THE COURT: Although, my understanding of the
8 issue, Mr. Dowd, is I don't have to find there was a contract
9 here if I find there was something that is an order within
10 the meaning of the statute.

11 MR. DOWD: That's correct, Your Honor, the purpose
12 of this -- the -- that I'm following is that I'm attempting
13 to show that a contract or a enforceable agreement did not
14 exist until the 21st of December. My purpose there attempt-
15 ing excluding the concept of an enforceable contract, then
16 we are dealing with the question solely of an order, because
17 in my interpretation of the regulation, it reads something to
18 the effect of an oral or written directive reasonably designed
19 to --

20 THE COURT: Designed to.

21 MR. DOWD: -- acquire property in the future which
22 need not be a contract, to avoid the possibility of an
23 interpretation that if it is a contract, it's automatically
24 an order, I wanted to exclude that.

25 THE COURT: Let me ask a question here of Mr. Zeller.

1 Is respondent seriously contending that there was a contract
2 in effect prior to the critical date? I mean is that an
3 issue?

4 MR. ZELLER: Yes, Your Honor. Your Honor, it is.
5 I --

6 THE COURT: You think there was a contract?

7 MR. ZELLER: Yes, Your Honor, I --

8 THE COURT: You are arguing -- I just want to know,
9 I'm not being argumentative, I just want to know.

10 MR. ZELLER: I understand that the Court may not
11 have to reach that question in order to decide the case, but
12 alternatively, since the petitioners have raised that issue --

13 THE COURT: May not have to reach what question?

14 MR. ZELLER: Whether there was a binding contract.
15 There could be an order without, obviously, there being a
16 binding contract.

17 THE COURT: Well, if there was a contract, there
18 was -- a binding contract, there was surely an order.

19 MR. ZELLER: Certainly, order, yes. Order is the
20 broader term.

21 THE COURT: The question is whether there was an
22 order. Now I'm asking whether I have to listen to a lot of
23 testimony as to whether there was a contract. Are you con-
24 tending that there was a contract?

25 MR. ZELLER: Yes, Your Honor, as I understand it,

1 there was what is known as a conditional contract at the date
2 of the signing.

3 THE COURT: But all you're really arguing is that
4 that was an order.

5 MR. ZELLER: Yes, Your Honor.

6 THE COURT: All right, go ahead, let's go ahead and
7 finish it up. I understand.

8 MR. DOWD: Mr. Haikala, could you -- do you recall --
9 do you recall a meeting with the representatives of the Maid
10 of the Mist Steamboat Company and your own people sometime in
11 December of 1971?

12 A I do.

13 Q And could you tell us where that meeting took place?

14 A In Port Dover.

15 Q And is that in Ontario, Port Dover?

16 A Ontario, yes.

17 Q And at that meeting, were certain documents signed
18 by you and by the Maid of the Mist officers?

19 A Yes.

20 Q And at that time, I show you exhibit 4-D, and ask
21 if you can identify that document.

22 A I can.

23 Q All right, would you tell the Court what that is?

24 A In my own words?

25 Q In your own words, yes.

1 A It's a condition to the contract that we would be
2 paid a sum of \$3,000.00 -- wait a minute, I've got this wrong
3 here, -- that the original contract, that -- or commitment
4 that we had with Maid of the Mist would not be in force
5 until such time as \$3,000.00 was paid and we could continue
6 with the contract.

7 Q All right fine.

8 THE COURT: You mean, by enforced, you mean you do
9 not consider yourself bound by it?

10 THE WITNESS: That's right.

11 THE COURT: All right.

12 MR. DOWD: Now when did you tell us when you did
13 receive that check?

14 A On the 21st.

15 THE COURT: Of what?

16 THE WITNESS: December, 1971.

17 MR. DOWD: Thank you very much. That's all I have
18 for Mr. Haikala.

19 THE COURT: You may cross examine.

20 CROSS EXAMINATION

21 BY MR. ZELLER:

22 Q Mr. Haikala, as you recall, in Exhibit 4-D, the
23 condition -- the conditioning letter, stated that represen-
24 tatives of Maid of the Mist were going to obtain another
25 contract with a crane company, do you recall that?

1 A That's right.

2 Q Was it your understanding that they would make
3 every effort possible to obtain that contract?

4 A Beg pardon?

5 Q Was it your understanding that they were, in fact,
6 going to make an affirmative effort to get that contract?

7 A They were -- that's their intentions, yes.

8 Q And they were to --were going to get it within a
9 short period of time?

10 A That's right.

11 MR. ZELLER: No further questions, Your Honor.

12 THE COURT: Mr. Dowd?

13 MR. DOWD: No further question.

14 THE COURT: Thank you very much.

15 (Witness excused)

16 MR. DOWD: Thank you, Mr. Haikala, you may step
17 down.

18 THE COURT: Call your next witness.

19 MR. DOWD: I'd like to call Mr. John McCamus, please.

20 THE CLERK: Would you remain standing for a moment
21 and raise your right hand, please. You do solemnly swear
22 the testimony you are about to give to the Court in this case
23 will be the truth, the whole truth and nothing but the truth,
24 so help you God?

25 THE WITNESS: I do.

1 THE CLERK: Be seated please sir.

2 THE WITNESS: Thank you.

3 THE CLERK: Would you state your name and home
4 address for the record please?

5 THE WITNESS: John McCamus, my home address is
6 50 Balmoral Avenue, Toronto, Ontario.

7 THE CLERK: Could you spell your last name, please?

8 THE WITNESS: Yes, M-c-C-a-m-u-s.

9 THE CLERK: Thank you.

10 JOHN MC CAMUS,

11 called as a witness, having been duly sworn, took the stand
12 and testified as follows:

* 13 DIRECT EXAMINATION

14 BY MR. DOWD:

15 Q Mr. McCamus, what is your profession?

16 A I'm a lawyer and a Professor of Law at Osgoode Hall
17 Law School in Toronto.

18 Q And Mr. McCamus, I show you a curriculum vitae
19 which was provided me just a moment ago. Would you tell us
20 what that is, sir? What does it represent, that document?

21 A It's a record of my training and it outlines some
22 of my professional experience and some, but not all of my
23 research, I guess.

24 Q Thank you. Your Honor, I wonder if I might offer
25 this rather than leading the witness through his background --

1 professional background, in order to expedite the matter?

2 THE COURT: Have you seen this Mr. Zeller?

3 MR. ZELLER: Yes, Your Honor, I have seen the
4 document and I will stipulate that this is his background
5 and his qualifications, so to speak.

6 MR. DOWD: I thought it might save time, Your
7 Honor.

8 THE COURT: Thank you. This will be received as,
9 I guess, Petitioner's Exhibit 11.

10 THE CLERK: 11.

11 MR. DOWD: Thank you. Mr. McCamus, would you -- did
12 you, at my request, examine certain documents, to wit, a
13 contract between the Maid of the Mist Steamboat Company,
14 Limited and Hike Metal Products, Limited, and a letter dated
15 December 16, directed to Hike Metal Products, and the Stipu-
16 lation of Facts in this case, and at my request -- well, did
17 you examine these documents at my request for the purpose of
18 rendering an opinion as to the time when a contract arose
19 between these parties in accord with the law of the Province
20 of Ontario?

21 A Yes I did.

22 Q Now, based upon your examination of these documents,
23 and based upon your knowledge of the law of the Province of
24 Ontario, do you have an opinion, sir as to when a contract
25 arose between these parties?

1 A I do. It would be my opinion that the contract
2 was entered into when the check was received by -- I take it
3 it was Mr. Haikala, somebody at Hike Shipbuilding.

4 THE COURT: What's your definition of a contract?

5 THE WITNESS: What is my definition of a contract?

6 THE COURT: Yes, I mean, what do you consider to
7 be a contract. I mean, I want to know -- you asked him whether
8 he thought there was a contract. It depends on what his
9 concept of a contract is.

10 THE WITNESS: A binding bilateral arrangement between
11 the parties, imposing obligations enforceable with law.

12 THE COURT: By either party as against the other?

13 THE WITNESS: Yes sir.

14 THE COURT: Okay. I just wanted to make sure.

15 MR. DOWD: Now, in the same vein, I want to be
16 sure that you considered when you render your opinion, you
17 did consider, number one, the delivery of the document and
18 the letter of condition on December the 16th, did you sir?

19 A Correct.

20 Q Did you consider the fact of the mailing of the
21 check on the 18th of December, 1971?

22 A I did.

23 Q And did you also consider it a fact of the execution
24 of the crane contract on December the 18th?

25 A I did.

1 Q And your conclusion is as you stated.

2 A Yes.

3 MR. DOWD: Thank you very much. I have no further
4 questions. Oh, excuse me, I believe in my trial memorandum,
5 could you explain or will you state for the Court the reasons
6 and the authorities upon which you base your opinion?

7 THE WITNESS: Yes. I suppose the facts create some
8 difficulties of interpretation. I'm confident that the
9 correct view under Canadian English precedent would be that
10 no contract was created until the check was received. It's
11 a rather odd arrangement. We have the parties negotiating
12 a -- an arrangement which they embody in the agreement, and
13 then having considered the fact that there is a collateral
14 problem, that is to say, a crane contract which has to be
15 entered into and is something without which they cannot go
16 forward, then decide to do something which they describe as
17 conditioning the delivery of the document, now I can't find
18 anything in the case law to deal with a similar fact situation.
19 A situation where the parties made the delivery of the document
20 somehow a special event and more than that said that the
21 delivery which actually took place -- handing of the document --
22 was conditioned on some further activity.

23 THE COURT: In other words, you -- the uniqueness
24 of this case is that the document -- the delivery of the
25 document itself was conditioned, because a conditional contract

1 of this kind is not unusual. Many at time, a house is bought--
2 so-called contract for sale to buy a house is entered into and
3 it's subject to the ability of the purchaser on or before
4 such and such a date to obtain satisfactory financing. And
5 that's --I would assume that's a contract. It may be a
6 contract subject to condition precedent to its fulfillment,
7 but it's a contract. Is that right?

8 THE WITNESS: That's right.

9 THE COURT: And the problem here is that the -- in
10 your view, is that the delivery of the document itself was
11 conditional.

12 THE WITNESS: And it seemed to be given some signi-
13 ficance by the parties. The analogies, I suppose one could
14 draw on to try and get some legal view of what the significance
15 of delivery would be, would it be the delivery of a deed,
16 in English and Canadian law and I presume in American law
17 as well, the deed is not effective until delivered. There
18 are some similar problems in negotiable instruments law.
19 The conclusion that is normally drawn is where delivery is
20 a required element, in the absence of delivery, of course,
21 the thing is of no effect. That's only marginally helpful,
22 I think, in imposing a legal analysis on these facts. I
23 think the central question is what did the parties intend?
24 Did they think that they had a binding contract between
25 them in some sense, at the time when the initial paper

1 transaction was handed over. The fact that they say that the
2 delivery is conditional and that the condition isn't met until
3 payment is received by the other party suggests to me that
4 they were operating under the assumption that nothing was
5 happening until that occurred, that they felt for some reason
6 that the delivery was a significant event and rather than
7 hold on to the contract -- if they hadn't said that this was
8 a significant thing, I think we'd all say that well, delivery
9 is unimportant in the execution of a bilateral contract of
10 this kind. But they don't say we're holding back the docu-
11 ment and refusing to deliver it, we're going to deliver it
12 conditionally. And I -- I think the reasonable inference
13 from that set of facts is that the parties thought that they
14 weren't carrying through with the execution process of the
15 agreement. There was also a provision in the agreement that
16 a payment would be made upon the execution of the document
17 and as well, the parties say well, we're holding back the
18 payment and indeed, they make the making of that payment
19 the condition which is to be performed in order to make the
20 delivery complete. Well, all of that suggests to me that
21 what we have here is parties who have come up to the point
22 where they have settled their terms, they've decided to
23 sign the thing as a matter of convenience, because
24 they're all in the same place at the same time and they
25 live in different communities and have decided not to make it

1 a final arrangement until other things are settled. There's
2 some difficulty -- more difficulty I suspect, although I'm
3 not putting myself forward as an expert on American law,
4 obviously, more difficulty in English and Canadian law
5 reaching the point where you have an agreement subject to a
6 condition than I think you would find in the American author-
7 ities. There are a number of cases, and I referred to some
8 of them in a list I gave to someone from your office, I
9 believe, which indicate that even though the parties have
10 reached an agreement, they have conditioned it in some way,
11 the Courts will say sometimes, not all that consistently,
12 it's an area in which there is some criticism of the
13 analysis in case law -- will say that there is no contract
14 in existence yet. In the real estate contracts, you have a
15 very clear line of authority in Ontario, that once you sign
16 the agreement to sell realty, if what you're talking about is
17 a third party approval of financing with Canadian Central
18 Mortgage and Housing Corporation, for example, or the Munici-
19 pal Board's approvals, but that would be a contract which is
20 subject to a condition present with respect to performance
21 only. In other cases, all of which I've referred to, the
22 Courts have said there is no contract in existence yet. I --
23 you could look at those authorities and go through them,
24 I think that you might find them a bit surprising. And
25 I'd be happy to talk about the history of that thing, why the

1 loss developed as it has. I'm not sure that you want me to
2 go through that sort of examination of the situation.

3 THE COURT: Would you -- would you think in this
4 whole conditional -- condition area that the business of no
5 contract or a contract with performance conditional, may turn
6 upon whether the condition involved is a condition within
7 the control of one of the parties, as against a condition
8 that is independent of the control of either party? In other
9 words, if you and I sign an agreement that I'm going to
10 sell you my fountain pen, provided the Sun is out at Noon
11 tomorrow, I think we've got a contract. And only performance
12 is conditional. On the other hand, if I buy your house on
13 condition that I'm able to get the financing I want by such
14 and such a date, maybe not. Would you think that was a fair
15 analysis?

16 THE WITNESS: Well, while I think that on the basis
17 of the Canadian case law, that is a reasonable rule of thumb--

18 THE COURT: I recognize that it's only a rule of --

19 THE WITNESS: -- I must say that it's not something
20 that is explicitly dealt with within the case law.

21 THE COURT: I'm not suggesting that it is an abso-
22 lute rule. I'm suggesting that this may explain some of the
23 differences in language of the cases.

24 THE WITNESS: I think that there's something in
25 that in terms of explaining the case law. But I must say

1 that there are English authorities where there is a condition
2 which is to be met by some third party activity, a third
3 party approving the arrangement, in which the Courts have
4 still said that there is no contract.

5 THE COURT: Um-hum.

6 THE WITNESS: Strangely enough, so you can't ex-
7 plain the cases on that basis. Myself, I find that a helpful
8 distinction in terms of saying well, if you've put everything
9 out of your hands, then sure, there's a contract at that
10 point. A situation where one of the parties is holding back
11 and saying well, I want to check with my banker and see if
12 he likes it and so on, that smacks to me of a situation
13 where the parties have not yet gone through the completion
14 of the agreement. As I said, nothing in the case law that
15 I could point to to say that's the critical factor.

16 MR. DOWD: Thank you Professor, I have no other.

17 THE COURT: Do you have any further questions as
18 a result of this discussion, Mr. Zeller?

19 MR. ZELLER: Just one question, Your Honor.

20 * CROSS EXAMINATION

21 BY MR. ZELLER:

22 Q Mr. McCamus, in your opinion, would the Ontario
23 Sale of Goods Act apply to the transaction in question in
24 this case?

25 A In the sense that once an agreement is entered

1 into, it appears to be a contract for the purchase and asle
2 of goods and that's covered under the Sale of Goods Act.

3 MR. ZELLER: No further questions, Your Honor.

4 THE COURT: Are you suggesting that the Ontario
5 Sale of Goods Act applies only after the contract comes into
6 existence and is not applicable in determining whether there
7 is or is not a contract, is that correct?

8 THE WITNESS: Quite so. Article --

9 THE COURT: I just wanted to make sure that that
10 was the distinction.

11 THE WITNESS: That is the distinction between the
12 Sale of Goods Act and Article II of the Inter-Co Commer-
13 cial Code, which attempts to deal with the formation problem.
14 The Ontario Sale of Goods Act is silent as to the question
15 of whether or not a contract has been entered into.

16 THE COURT: Thank you very much, Mr. McCamus.

17 MR. DOWD: Thank you very much, Professor. Your
18 Honor, the petitioner has no further witnesses.

19 (Witness excused)

20 THE COURT: Mr. Zeller?

21 MR. ZELLER: Your Honor, the respondent has no
22 witnesses.

23 THE COURT: You understand that -- Mr. Dowd -- that
24 while I was delighted to have the good Professor's testimony
25 and the exchange that I had with him that whatever conclusions

1 I reach as to the law or the legal principles involved and
2 their application, while I may find this discussion very
3 helpful, it's going to be my own independent judgment.

4 MR. DOWD: I understand.

5 THE COURT: I'm not going to rely on the good
6 Professor as erudite and expert as he may be.

7 MR. DOWD: I understand that, Your Honor. I just
8 hope that his testimony might be somewhat helpful to you.

9 THE COURT: Well, I found the exchange very helpful
10 in clarifying the thinking that has to go into the problem,
11 and you realize, of course, that even if I end up finding
12 there isn't any contract, I'm still left with the question
13 of whether there was an order, or to put it the other way
14 around, if I find that there was an order, I never have to
15 get to this question of whether there was a contract.

16 MR. DOWD: I understand that, Your Honor.

17 THE COURT: And I don't really know what the
18 word order meant in the statute --

19 MR. DOWD: That I think is a mutual problem.

20 THE COURT: -- and I don't know whether there is
21 anything in the legislative history that's going to help me
22 or what. It obviously meant something less than a contract,
23 because there are provisions in the investment credit sections
24 themselves, which use the word contract.

25 MR. DOWD: The word contract, that's correct.

1 THE COURT: So order obviously means something
2 different in this context. Now, what difference, I don't
3 know.

4 MR. DOWD: Your Honor, I'd like to say that I had
5 an opportunity to examine the Internal Revenue Code, and I
6 believe that the instances where the term order is used in
7 the instance that we're referring to -- there are Court order
8 and others, but order -- there are about four or five instan
9 only and they all deal with the basic question that we're
10 dealing with now and I -- what background there is or other
11 usages, and Mr. Zeller and I will certainly try to be helpf
12 for the Court.

13 THE COURT: All right, what do you want in terms
14 of brief times, gentlemen? The usual rules are 45 and 30.

15 MR. ZELLER: That would be fine, Your Honor.

16 MR. DOWD: I think that would be satisfactory.

17 THE COURT: All right. 45 days for original brief
18 30 days for reply. Would you like seriatim briefs here,
19 do you want to go first and -- you know, it's the kind of
20 case that lends itself to seriatim briefs. There's no rea
21 dispute as to the facts. So it doesn't really make any
22 difference to me.

23 MR. ZELLER: That would be acceptable to respon

24 THE COURT: All right, let's say 45 days for
25 petitioner's original brief, and 30 days for reply, becau

1 you will, by this time, have had --

2 MR. ZELLER: Most certainly.

3 THE COURT: -- 30 days for answering brief,
4 respondent's answering brief and 15 days for petitioner's
5 reply brief.

6 MR. DOWD: Your Honor, that would be satisfactory.

7 THE COURT: And I will ask at that point so that
8 you don't lose any time on the 15 days, I'll ask both of
9 you -- you're likely to do it, respondent sometimes forgets --
10 will each of you please -- when you send a -- when you send
11 your brief, particularly applicable to the respondent, when
12 you send your brief to the national office for filing with
13 the Court, Mr. Zeller, will you please informally give -- if
14 you don't want to do it formally, Mr. Dowd a copy. Or at
15 least when you get word from the national office that it's
16 been filed, let's put it that way. So that he doesn't have
17 to wait for it to come out by mail from Washington, which
18 can cut three or four days off the 15 days I've given him.

19 MR. DOWD: I appreciate that, Your Honor.

20 MR. ZELLER: Yes sir, I'll mail a copy.

21 THE COURT: I just want him to have the maximum
22 benefit of the 15 days.

23 MR. ZELLER: I'll mail a copy to be in Niagara
24 Falls the next day.

25 THE COURT: All right, fine.

1 MR. ZELLER: Thank you.

2 THE COURT: Thank you very much gentlemen. Anything
3 further to come before the Court at this session?

4 THE CLERK: Would you like me to give the brief
5 dates?

6 THE COURT: Yes, please. I'm sorry.

7 THE CLERK: 45 days reply December 27, 1976, 30
8 days thereafter is January 26, 1977. 10 days thereafter is
9 February 10, 1977.

10 MR. DOWD: Excuse me, Your Honor, did I misunderstand?
11 I thought that that reply brief was 15 day, not a 10 day.

12 THE COURT: Yes, 15 day.

13 THE CLERK: January 26, February 1, February 10.

14 MR. DOWD: February 15, wouldn't it be?

15 THE COURT: What's the answering brief date?
16 Respondent's answering brief date?

17 THE CLERK: January 26.

18 THE COURT: January 26 to February 10, I think is
19 15 days.

20 MR. DOWD: Oh, okay, excuse me, Your Honor.
21 I can't count.

22 THE COURT: All right, I want to go off before I
23 close off this session. This session of the Tax Court is
24 adjourned. Thank you.

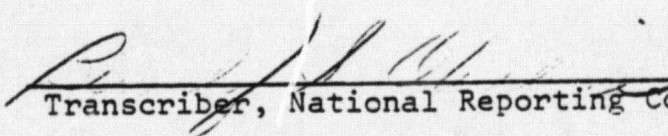
25 (Whereupon at 10:00 A. M. the case was adjourned
as described above.)

UNITED STATES TAX COURT

Certificate of Transcriber and ProofreaderCase Docket No. 504-76 Name: Maid of the Mist Corporation

We the undersigned do hereby certify that the foregoing pages, numbers 1 through 24 inclusive, are the true, accurate and complete transcript prepared from the verbal recording made by electronic recording by Lesyle Williams on November 11, 1976 before the United States Tax Court at its session in Buffalo, New York in accordance with the applicable provisions of the current verbatim reporting contract of the Court, and have verified the accuracy of the transcript by comparing the typewritten transcript against the verbal recording.

November 30, 1976
(Date)



Transcriber, National Reporting Co., Inc.

(Date)

Proofreader, National Reporting Co., Inc.